TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 78.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

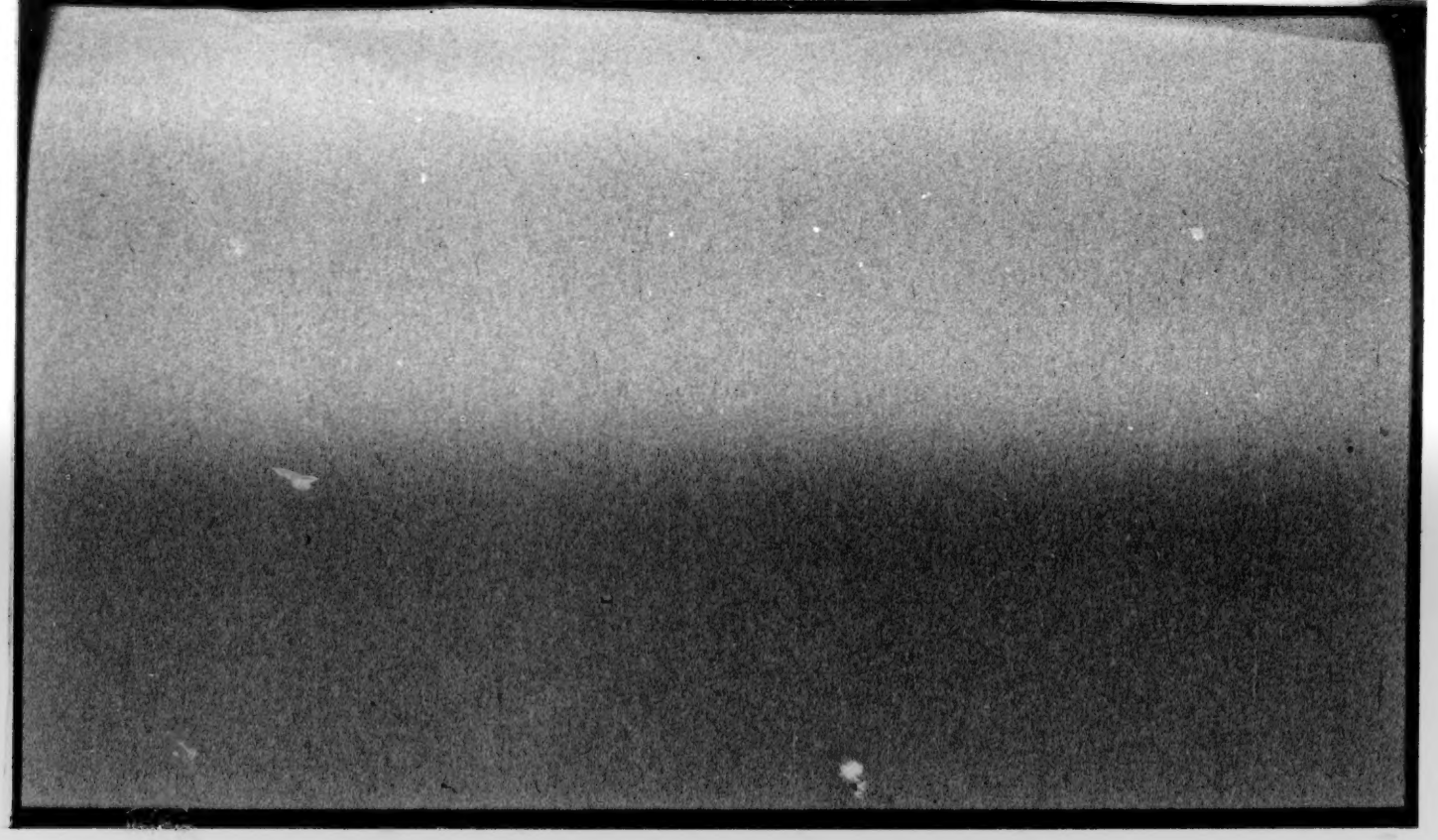
vs.

THE ABILENE COTTON OIL COMPANY.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JULY 13, 1905.

(19,844.)



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a *Transcript of Record.*

Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABILENE COTTON OIL COMPANY, Defendant in Error.

Appealed from the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

1 THE STATE OF TEXAS, *Taylor County:*

At a regular term of the District Court of Taylor County, with Hon. J. H. Calhoun as Judge and ending on April 16, 1904, the following case came on for trial to-wit:

Caption.

ABILENE COTTON OIL COMPANY
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Second Amended Original Petition.

Filed April 14th, 1904.

In the District Court of Taylor County, Texas.

ABILENE COTTON OIL COMPANY
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

To the Judge of said Court:

Now comes plaintiff and leave of the court being had, files this its second amended original petition, in lieu of its first amended petition filed herein August 1903, same being in lieu of its original petition filed herein October 14th, 1901, and for such amendment says: Plaintiff Abilene Cotton Oil Company complaines of the Texas & Pacific Railway Company, and represents that plaintiff is a corporation duly incorporated under the laws of the State of Texas, and that defendant is a railway corporation duly incorporated, operating a line of railway from El Paso, Texas, through the State of Texas and Louisiana to the City of New Orleans in said State of Louisiana, and also operating branch roads in the State of Louisiana. The said railway of said defendant extends through Taylor county, Texas, and it has a local agent and representative in said county, to-wit: H. A. Readding. That the town of Alexandria, in said State of Louisiana, is

a point on defendant's line intermediate between the town of Abilene, Texas, and the town of Melville, Louisiana, and the following towns in the State of Louisiana, to-wit: Long Bridge, Moreauville, Lecompt, Moreland, Cotton Port, Mansura, and Evergreen,
2 are stations on defendant's line of railway in the State of Louisiana between said Melville and said Alexandria. That in September and October, 1901, the said defendant had issued and established for its charges rates and fares for the transportation of cotton seed in carload lots between stations on said defendant's railway in the State of Louisiana as follows: 10 miles and under, five cents per hundred pounds; 20 miles and over 10 miles 6¼ cents per hundred pounds; 30 miles and over 20 miles, 7½ cents per hundred; 40 miles and over 30 miles 8¾ cents per hundred; 50 miles and over 40 miles, 10 cents per hundred; 60 miles and over 50 miles, 11 cents per hundred; 70 miles and over 60 miles, 12 cents per hundred; said rate being applicable to cotton seed in car loads, minimum 30,000 pounds to the car, except where capacity of car is less. That at said time the rates and freight charges as published and made public by said defendant for cotton seed in such car load lots per hundred pounds on the basis of the distance of said above named points from Alexandria was as follows: from Long Bridge, Moreauville, Cotton Port and Mansura such rate was 10 cents per hundred pounds, Lecompt 6¼ cents per hundred pounds, Moreland 5 cents per hundred pounds and Evergreen 8¾ cents per hundred pounds. That each of said places are East of said town of Alexandria. That such was the lawful rate established, proclaimed and made public by and through the action of defendant railway company between said points to said town of Alexandria. That at all of said times the town of Abilene, in Taylor county, Texas, was what is known as a common point and a station on the line of said defendant company, and at said time said defendant had established, proclaimed, published and made public its rates for cotton seed moving between Alexandria, Louisiana and west thereof, as fol-
3 lows: for 500 miles and over 300 miles 20 cents per hundred pounds, and said 20 cents rate applied to all common points in the State of Texas, regardless of distance from Alexandria, and by reason of the distance and by reason of said Abilene being a common point the said rate so published and proclaimed on such cotton seed from said Alexandria to said Abilene was 20 cents per hundred pounds, and def't had published and proclaimed and made public its rates on cotton seed from said Alexandria to Abilene and the rate was 20 cents per hundred pounds, and said defendant had so established and published its rate from Melville and stations west thereof to the town of El Paso aforesaid at 36 cents per hundred pounds. That Abilene is a station on defendant's road between said Melville and said El Paso and between said Alexandria and said El Paso and between all other points herein named and said El Paso. That the distance from Abilene to El Paso is something over 400 miles. That by reason of this said 35 cent rate per hundred pounds, a shipper at Melville or a shipper at any point between Melville and said Alexandria could ship cotton seed from said Melville or other

points through said Abilene and more than 400 miles west thereof to El Paso for 35 cents per hundred pounds. That in its duty to the public the defendant was required to charge not more than a reasonable rate, and that a charge unreasonable in amount and discriminative in behalf of any community and against other communities and discriminative in favor of one shipper and against other shippers was unlawful and illegal. That in law defendant was not permitted to charge more for a short haul than for a long haul, and in law said defendant would not be entitled to charge more for the transportation of cotton seed than the sum of its local rates between said points of shipment. That in September and October, 1901, parties in behalf of plaintiff had at said towns, to-wit: Long
4 Bridge, Moreauville, Lecompt, Moreland, Cotton Port, Mansura, Evergreen, cotton seed which they *was* desirous of shipping over the defendant's said lines of railway from said respective points to said Abilene, Texas, in carload lots, and said cotton seed was delivered by parties in behalf of plaintiff to said defendant company, to be by it transported and conveyed from said respective points to said Abilene, said cotton seed being shipped by divers persons and companies and corporations from said respective points to said Abilene, all consigned to plaintiff. That by reason of the rates so published and proclaimed, plaintiff was entitled to have its cotton seed transported from said Long Bridge, from Moreauville, said Cotton Port and said Mansura, at the rate of 30 cents per hundred pounds, and it was entitled to have its said cotton seed transported from said Lacompt at the rate of 26¼ cents per hundred pounds and from said Moreland at the rate of 25 cents per hundred pounds, and from Evergreen at the rate of 28¾ cents per hundred pounds, that is, the local rate as published and proclaimed between said points and *and* said Alexandria and the rate so published and proclaimed between said Alexandria and said Abilene would aggregate the sum first specified between said respective points and Abilene. That it was the duty and defendant was obligated to transport and convey said cotton seed between said points and said Abilene at a sum not exceeding the sum of th*e* two rates, that is, the said 20 cent rate from Alexandria to Abilene and the said rates between Alexandria and said other points. That the defendant received said cotton seed at said points of shipment and became bound to convey same for reasonable and extortionate rate from said points to said Abilene said defendant did convey same to this plaintiff; but refused to deliver same until plaintiff paid for said cotton seed transportation from each of said points the sum of 67 cents per hun-
5 dred pounds, a sum largely in excess of the sum of said two rates and a sum unreasonable, prohibitive, unjust and unlawful. That the purpose of said charge was to prevent this plaintiff from buying cotton seed at points on defendant's line in the State of Louisiana east of said Alexandria, and the defendant unlawfully contended for and extorted from this plaintiff the sa*i*s sum of 67 cents per hundred pounds for the purpose and with the intent to thereby make the rate so ex*h*orbitant between points on its line east of Alexandria and Abilene as to prevent plaintiff from going into

the markets at said places and buying cotton seed and shipping same to its Mill at Abilene, Texas, aforesaid, the purpose being and in fact was, to unlawfully discriminate between plaintiff in the conduct and operation of its cotton seed oil mill at said town of Abilene and cotton seed oil mill in the State of Louisiana east of Alexandria. That to receive its said cotton seed so shipped, plaintiff was required to pay defendant the sum of $3458.83 which was the amount of freight on said cotton seed at the rate of 67 cents per hundred pounds. That the freight on said cotton seed, taking same at the sum of the said local rates from Alexandria east and 20 cent rate from Alexandria to Abilene would have amounted to $1507.00. That thereby defendant extorted from plaintiff the sum of $1951.83 in excess of the reasonable rate and the legal rate of $1507.00. That to receive its cotton seed plaintiff was required and compelled to pay and did pay defendant company the said sum of $3458.83, which was in excess of the rates aforesaid in the sum of $1951.83, and said amount so collected was unreasonable, extortionate, unjust, unlawful and was done with the evil and corrupt intent to discriminate, as aforesaid. That plaintiff paid said exhorbitant charge under protest for the purpose of obtaining its cotton seed from de-
6 fendant company. That said sum was paid during the months of September and October, 1901, the last payment made being to-wit: October 7th, 1901, and plaintiff is entitled to recover from defendant company the said sum of $1951.83, with legal interest from said October 7th, 1901. That the amount so charged, the rate exacted, the amount paid, the correct rate and the amount that should have been charged and the amount overpaid are set out in Exhibit A hereto attached and made a part hereof. That, as stated, defendant company at said time had established a rate on cotton seed in car load lots from its stations in Louisiana, including Melville station and stations west thereof to El Paso, Texas, a rate of 35 cents per hundred pounds. That by reason of said through rate parties could ship and defendant would transport from said Melville and from each and all of said other places in Louisiana heretofore mentioned to said town of El Paso cotton seed in car load lots at the rate of 35 cents per hundred pounds. That such transportation would be made through said town of Abilene and over 400 miles west thereof. In other words, for 35 cents per hundred defendant would convey and transport cotton seed as far west as Abilene from said Louisiana points and from Abilene more than 400 miles still further west to El Paso. That it was unlawful for defendant to charge more for conveying plaintiff's cotton seed from said points in Louisiana to Abilene than it charged and its rates were for conveying like cotton seed from said Louisiana points to said town of El Paso. In other words, it was unlawful for defendant to charge more for the short than it did for the long haul. That if plaintiff be not entitled to recover the difference between the sum of the said 20 cent rate and the local rate from said shipping points to Alexandria and the said 67
7 cents per hundred pounds, then anyhow plaintiff will be entitled to recover the difference between said 35 cents and said

67 cents for the shipment above complained of. That, as stated, defendant extorted from plaintiff before it would deliver the cotton seed aforesaid the sum of $3458.83, which exceeded the rate to El Paso in the amount of $1655.62, that is to say, the rate on said cotton seed at 35 cents per hundred pounds from said shipping points in Louisiana to said El Paso would have been $1803.23, whereas, in transporting said cotton seed to an intermediate point east of El Paso, something more than 400 miles, defendant extorted, charged and received from plaintiff the sum of $3458.83, a sum in excess of said El Paso rate of $1655.62; if plaintiff be not entitled to recover as above stated from the difference of the sum of said 20 cent rate and said local rate into Alexandria, then plaintiff is entitled to recover the said $1655.62, with interest from said October 7th, 1901. That the names of the stations, the rate charged, the amount paid, the rate to El Paso, the difference in the rate and the amount over paid are set forth in Exhibit B hereto attached and made part hereof. That said 67 cents per hundred pounds was and is an unreasonable rate and charge, and was not made and done for the purpose of raising and procuring a fair return for defendant for the services rendered but was made for the purpose of keeping plaintiff from buying such seed east of said Alexandria, and was done for the purpose of prefer-ing the cotton mills east of said Alexandria against this plaintiff, and create a monopoly in favor of said cotton mills east of said Alexandria. That a fair and just charge for such traf-ic was and is not more than 20 cents per hundred from said Alexandria to said Abilene, and not more than the said local rates from said other points to said Alexandria added to said 20 cent
8 rate from Alexandria. That defendant is a common carrier for hire of freight and passengers between each and all of said above enumerated points. That by its actions aforesaid it has discriminated between said Abilene and points on its line of railway and east of said town of Alexandria, and it has discriminated between plaintiff and parties desiring to purchase cotton seed at points on its said line of railway east of said Alexandria, and by its actions aforesaid has wrongfully charged plaintiff for the freight aforesaid an unreasonable and unjust rate and an unlawful and extortionate rate, the amount of which is as heretofore stated.

Wherefore, plaintiff sues, and the defendant having answered, prays that it have judgment against defendant, first for the said sum of $1951.83 with legal interest from October 7th, 1901, second, if plaintiff be not entitled to recover that amount, then that it have judgment for said $1655.62 with legal interest from said October 7th, 1901, third, for costs of suit and for general, special, legal and equitable relief.

HARDWICKE & HARDWICKE,
Attorneys for Plaintiff.

EXHIBIT A.

Ex. Bill.	Way bill.	Car.	Paid.	Correct am't.
944	32	5723	283.75	127.05
943	29	3616	241.20	108.00
939	51	4470	290.11	129.90
947	19	F128	233.16	104.40
945	37	8530	213.73	95.70
941	35	F152	267.67	119.85
940	61	7743	255.94	100.28
948	14	7334	290.78	108.50
1152	32	8085	212.32	95.07
9				
1151	47	7095	259.63	116.25
1151	42	8722	272.36	121.95
1150	65	5881	332.99	149.10
	21		305.19	130.95

Over paid.
156.99
133.20
160.21
128.75
118.03
147.82
155.66
182.28
117.25
143.38
150.41
183.89
174.24

Total weight—516,210 pounds.

Endorsed: Abilene Cotton Oil Co. *vs.* T. & P. Ry. Co. 2nd Original Petition. Filed April 14, 1904. V. F. Womack, Dist. Clk. Dist. Ct. Taylor Co. Texas.

Def'ts' Original Answer.

Filed April 14th, 1904.

Defendants' Original Answer.

In the District Court, Taylor County, Texas.

ABILENE COTTON OIL COMPANY
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Now comes the defendants, the Texas & Pacific Railway Company, and in answer to the plaintiff's petition filed herein says:

First:—It specially excepts to the plaintiff's 2nd amended original petition and says the same is insufficient in law for plaintiff to maintain this suit upon the allegations therein contained because
10 the allegations of said petition show that if the plaintiff has any cause of action against this defendant it can only prosecute and maintain the same in some U. S. Court of competent jurisdiction or by proper complaint filed with and properly prosecuted before the Interstate Commerce Commission of U. S. and of the sufficiency of this exception this defendant prays judgment of the court.

Second:—It specially excepts to that part of plaintiff's 2nd amended oroginal petition alleging that the defendant charges the plaintiff an unreasonable sum for the transportation of his cotton seed and says that the allegations are insufficient in law and too vague, indefinite and uncertain to put defendant on notice thereof and of this it prays the judgment of the court.

Subject to the foregoing exceptions the defendant denies each and every allegation in the plaintiff's petition and says the same are not true in fact and demands strict proof of the same.

Further answering herein, if compelled to do so, this defendant says that at the time and prior to the time of the shipment made as alleged in plaintiff's first amended original petition this defendant did promulgate, publish and post its schedule of rates wherein and whereby it adopted, published and posted the rate provied for transporting and carrying cotton seed in car load quantities subject to minimum weights from the points mentioned in the plaintiff's first amended original petition to Abilene, Texas, and that said schedule of rates published and posted by it in accordance with the provision of the Interstate Commerce law, and that at the time of the shipment of said cotton seed the through rates from said points to Abilene, Texas, was 67 cents per hundred pounds and that at the time of the shipments in controversy were made 67 cents per hundred pounds was a through rate adopted and posted by this de-
11 fendant in accordance with the provisions of the Interstate Commerce law and that the Shipments described in the plaintiff's 1st amended original petition were an interstate shipment.

The defendant further says that having adopted, published and posted said rate in accordance with the Interstate Commerce Law it was not authorized and could not in accordance with law legally demand or collect from plaintiff a greater or lesser rate for the transportation of said cotton seed from the points mentioned in the first amended original petition of the plaintiff than the sum of 67 cents per hundred pounds as was so provided in the schedule of rate adopted, published and posted by this defendant in accordance with the provisions of the said Interstate Commerce law. This defendant alleges and avers that it did promulgate, publish and post its schedule of rate in accordance with the provisions of the Interstate Commerce law prior to the time of the shipment defendant made as alleged in the plaintiff's petition and that said rate was in full force and effect and that no other rate than 67 cents per hundred pounds for transportation of cotton seed could have been charged the plain-

tiff and that the sum of 67 cents per hundred pounds was a legal rate and the rate provided by law for the transportation of said cotton seed and no other rate. Defendant says that its schedule of rates had been duly filed with the Interstate Commerce Commission and had been adopted by it and that said schedule provided for 67 cents per hundred pounds freight on cotton seed between the points mentioned in the plaintiff's petition and that said rate has been adopted by the Interstate Commerce Commission and is the only legal and lawful rate which could be charged and that said rate was not exhorbitant and was not unreasonable, but was the rate provided by law and this defendant could charge no other rate.

12 Wherefore defendant says plaintiff ought not to recover in this case and of this prays the judgment of the court.

J. M. WAGSTAFF,
Att'y for Def., T. & P. Ry. Co.

End[d] :d: Abilene Cotton Oil Co. *vs.* T. & P. Ry. Co. Def'ts Origin. Answer. Filed April 14, 1904. V. F. Womack, Dist. Cl'k. Dist. Court Taylor County Texas.

Statement of Facts.

Filed April 16th, 1904.

Statement of Facts.

In the District Court of Taylor County, Texas, April 14, 1904.

No. 1644.

ABILENE COTTON OIL CO.
vs.
THE TEXAS & PACIFIC RAILWAY CO.

Statement of Facts.

Plaintiff offered in evidence thirteen bills of lading covering the shipments of cotton seed involved in this suit and read parts of same, as follows:

All issued by defendant company and being for cotton seed in carloads from following points in Louisiana and dates to Abilene, Texas, consigned to plaintiff to-wit:

From Cotton Port Sept. 26/01 from Evergreen Sept 27/01. Moreland Sept. 25/01. Long Bridge Sept. 17/01, Long Bridge Sept. 28/01, Lecompt Sept. 26/01, Long Bridge Sept. 23/01, Long Bridge Sept. 26/01, Cotton Port Sept. 23/01, Long Bridge Sept. 20/01, Mansura Sept. 20/01, Moreauville Sept. 23/01, Long Bridge Sept. 27/01.

E. S. Kean a witness for plaintiff, testified as follows: In September and October, 1901, I was connected with the Abilene Cotton Oil

Co., plaintiff in this suit, and I remember the transaction in question; I represented plaintiff, and paid the freight charges on the different cars of cotton seed at the rate of 67 cents per 100
13 pounds. I now have in my hand the bill of lading for way-bill 14, car 7742: the weight of the shipment was 43400 lbs.; it was from Moreland, La.; I paid freight charges $290.78; taking the local rate into Alexandria and 20 cents from Alexandria to Abilene, it would be 108.50. Next is car 3616; weight 43300 lbs., way bill 51, from Cotton Port, La.; amount paid $290.11; the sum of two local rates was $129.90. The next is way bill 19, from Mansura, La., weight 34800 lbs., on which I paid $233.16; the sum of the two locals was $104.40. Next is way bill 32, from Moreauville, La.; amount paid $212.32; the sum of the two locals was $95.07; the weight was 31,690 lbs. Next was way bill 65, car 8722, from Cotton Port, La., weight 49700 lbs.; amount paid $332.99, and the correct amount would have been $149.10. The next is way bill 21, car 5881, from Evergreen, La., weight 45550 lbs.; amount paid $305.19, and the sum of the two locals was $130.95. The next was way bill 35, car 3530, from Long Bridge, La.; weight 39906 lbs.; amount paid $267.67, and the sum of the two local rates amounted to $119.85. The next is way bill 29, car 5723, from Long Bridge, La.; weight 36000 lbs.; amount paid $241.20, and the sum of the two locals was $108.00. The next is way bill 47, car 8085, from Long Bridge, La.; weight 38750 lbs.; amount paid $256.63, and the sum of the two locals amounted to $116.25; The next is way bill 61, car F152, from Lecompte, La.; weight 38,200 lbs.; amount paid $255.94, and the sum of the two locals was $100.28. The next is way bill 37, car F128 from Long Bridge, La.; weight 31900 lbs.; amount paid $213.73, and the sum of the two locals amounted to $121.05. The next is way bill 32 car 8236, from Long Bridge; weight 42,350 lbs.; amount paid $283.75; the sum of the two locals $127.05. I made these payments to the cashier of the T. & P. railroad at Abilene, Mr. George Brown; I made the payments under protest, because they were excessive, and made them in order
14 to get the cotton seed. This cotton seed was shipped in car loads from the points named in the petition to Abilene, Texas, and the payments were made by me Sept. 30th to October 7th., 1901, same being 13 cars so shipped & paid for.

JOHN GUITAR, a witness for plaintiff, testified as follows:

I am manager of the Abilene Cotton Oil Co., plaintiff in this suit; I have been engaged in the cotton oil business since about 1889, receiving shipments of cotton seed from points in Louisiana and Texas, and principally over the Texas & Pacific road; I have been at Abilene only since about 1898. I am familiar with what are known as "common points" in Texas for rate purposes; Abilene is such common point. We had been engaged in shipping cotton seed from points in Louisiana east of Alexandria previous to the shipments involved in this suit, at a rate from 20 to 22½ cents per 100 lbs. to Abilene; these rates *contained* for that season; I don't know how long afterwards they continued, but it was as long as we were in business that year. Before we went into Louisiana to buy the

seed involved in this suit, I went to the T. & P. agent in Abilene and asked him if there had been any change in the rates, and he said there had not, and when these first shipments arrived, and we got notice of the 67 cent rate on the seed we were thunder-struck; I went immediately to the office at Abilene to see about it, but the agent could not explain it; he said he did not know anything about it; I then went to Dallas and called upon Mr. E. L. Sargent, General Freight Agent of the Texas & Pacific road; he told me he was just leaving his office upon an engagement, and referred me to Mr. Redfield, assistant general freight agent; I then went in to see Mr. Redfield; upon seeing me he kind of laughed, and said "I know
15 what you are here for; we have got you this time; Guitar will have to pay the freight;" I told him that it looked so, as the cars that had arrived the previous day were billed at 67 cents per 100 lbs., and he said "That is what you will have to pay." I told him that surely something was wrong, that I had at first thought it was a mistake of the agent at Abilene, and that we could not stand that rate, that no mill in the world could live at it; he said "we don't want you in Louisiana any how, you bother those mills there too much; they are jumping on us and we have got to keep you out of there." I told him that the country out here had had a very short crop, and had to have something to live on, and that it needed the seed for feed; he said "you have got to pay the freight this time." I asked him if he had a Louisiana local tariff; he said he had, and one of his assistants brought me one in, and also another tariff which applied between Alexandria and Abilene, and he gave them to me to look at; the two tariffs now handed to me are the ones he gave me; I looked the tariffs over with him; I said "There is one thing sure, we have got to have some seed, and it looks to me like we have got to go down there and pay the local tariff into Alexandria, and reship them from there; you can't keep us from doing that." He did not say a word, but stopped, and he had a peculiar look in his eye; he then said "you may do it, but it will give you a great deal of trouble;" he said that I would have to re-bill it all, and that it would not be worth the trouble, and he said "I advise you not to do it." I thanked him for his advice, and said "we may have to do it." We passed a few more remarks, and he gave me the two tariffs, and I brought them home with me. He marked on the tariffs the rate that applied at that time. We had shipped a few cars from Alexandria to Abilene previous to that time, at a 20 cent rate; at the time of our
16 conversation, Mr. Redfield recognized that there was a 20 cent rate from Alexandria to Abilene, and he marked it on the tariff; it appeared from his conversation that the territory he wanted to keep us out of was below Alexandria. The plaintiff was at that time engaged in the manufacture of cotton seed products, and needed the cotton seed for the purpose of operating its plant; Abilene and Alexandria are both stations on the Texas & Pacific road, and the other points from which the cotton seed in question was shipped, were also on the Texas & Pacific road; El Paso is about 450 miles west of Abilene. We paid the 67 cent rate on the cars in question, and immediately wired the parties in Louisiana to ship no

more seed until they heard from us, and afterwards I wrote them fully and sent the money to pay the freight from those other points into Alexandria, and had the cotton seed reshipped from Alexandria to Abilene. The business continued, but we had a great deal of trouble in getting the cotton seed out of Alexandria; the defendant let our cars lay on the track there and would not bill them out. We had the parties in Louisiana bill the seed to us at Alexandria, and re-ship from Alexandria to Abilene, at 20 cents per 100 lbs.; in this way we got the last shipment for the sum of two locals, that is, for the local to Alexandria plus 20 cents from Alexandria; we shipped some 100 cars in this way, after we were required to pay the 67 cent rate on the cars involved in this suit. I know of my own knowledge what is a reasonable and what is an unreasonable rate for the transportation of cotton seed, in car loads, from the points mentioned in Louisiana to Abilene, Texas; a reasonable rate would be some where from 20 to 25 cents per 100 lbs.; 67 cents per 100 lbs. is unreasonable; a rate exceeding 28¾ lbs. would be very unreasonable.

Cross-examination:

17 It was in 1899 and 1900 that we shipped sotton seed from points east of Alexandria to Abilene at a 20 cent rate; I can not remember all of the stations from which we shipped, but Cheneyville was one of them at that rate; I know the rate was not over 22½ cents. I do not know what would be a reasonable rate on any other class of freight from Alexandria to Abilene, except cotton seed; me idea is that sugar and things of that kind go at about the same rate as cotton seed; when I say I know what would be a reasonable rate on cotton seed I mean in comparison with other classes of freight; I don't know what articles are put in class A; I know, of my own knowledge, that the railroad company makes money out of shipments of cotton seed from Alexandria to Abilene at 20 cents per 100 lbs.; they would make anywhere from 30 to 40 per cent. on a car of cotton seed at such rates; I figured with Mr. Sargent, the general freight agent, on some low classes of freight and he showed me what it would cost the railroad company per ton per mile; I figured with him on molasses from Louisiana points to Abilene, to feed cattle with, and he showed me that the cost would be about 3 mills per ton per mile, and he offered to haul molasses for me at thirty to thirty-five dollars per car to Texas common points from stations further down east in Louisiana than the points now in question; that would have been a rate os seven or eight or nine cents per 100 lbs.; When I say the railroad company would make 40 per cent. on cotton seed in car loads from Alexandria to Abilene at a 20 cent rate, I am making a comparison in my mind of what Mr. Sargent told me about the rate on Molasses; if it costs them so much to haul 25 tons of one stuff, it would cost the same on cotton seed. The rate on cotton seed from Galveston to Abilene is 17½ cents per 100 lbs. and it is the same from Marshall, Texarkana and also from Corsicana,

18 and when from Corsicana it comes over two lines of road; all these are rates under the Texas Railroad Commission, and the distance is about half as far as it is from Alexandria to Abi-

lene; it is my opinion that the railroad companies originated the Texas Railroad Commission, that they got it up. I don't know any thing about what the rates pay the railroad company, except what Mr. Sargent told me about the cost of this molasses business, and I base my idea as to what is reasonable upon what the rates have been heretofore. I never knew that the 67 cent rate was claimed to be an interstate rate until the question came up in this suit. As soon as we got notice of the 67 cent rate on these cars, I went to see Mr. Sargent, and it was after that visit that thi- suit was filed; no one told me that it was an interstate rate, and the only rate that they could charge; they said they had me this time, and that I would have to pay the freight, and Mr. Redfield looked like he felt good over it. If there are several hundred articles in the same class as cotton seed, upon which the Railroad Commission of Texas fixes the same rate from Galveston, I am not prepared to say that the rates are unreasonable. Avoyelles is further down east from Alexandria, La.; it is a little road which I think is owned by the Texas & Pacific, and is operated as a part of its line. We shipped a good deal from the stations on this little railroad, but I don't know whether we shipped any from Avoyelles station or not; it was handled as T. & P. business. We paid 17½ cents per 100 lbs. back to New Orleans on cotton seed meal made from the same seed we had received at Abilene, and paid the same rate to Galveston.

Plaintiff then offered the local freight tariff between points on defendant's line in Louisiana, being same furnished witness Guitar by Mr. Redfield and referred to in the testimony of Mr. Guitar it being as follows:

"El Paso Rout-."

19 The Texas & Pacific Railway Company Freight Traffic Department. Local Freight Tariff L. B. No. 461-h. Effective December 31st 1897. Applying on cotton seed, cotton seed meal and cake and cotton seed hulls, C. L. (Minimum weight as noted below) Between stations on the Texas and Pacific Railway in Louisiana, except where otherwise provided. Cotton seed, car loads, minimum 30,000 lbs., except where capacity of car is less.

Distances.	Rates in cent- per 100 pounds.
10 Miles and under	5
20 " " over 10 miles	6–¼
30 " " " 20 "	7–½
40 " " " 30 "	8–¾
50 " " " 40 "	10
60 " " " 50 "	11
70 " " " 60 "	12
80 " " " 70 "	12–½
90 " " " 80 "	13
100 " " " 90 "	13–½
110 " " " 100 "	14
120 " " " 110 "	14–½
130 " " " 120 "	15

140	"	"	"	130	"	.....	15–½
150	"	"	"	140	"	.....	16
160	"	"	"	150	"	.....	16–½
170	"	"	"	160	"	.....	17
300	"	"	"	170	"	.....	17–½

Plaintiff introduced the other rate schedule furnished Mr. Guitar by Mr. Redfield and referred to in the testimony of Mr. Guitar; this schedule shows that the rate on cotton seed "Via Texas & Pacific Ry. cotton seed, moving between points, Alexandria, La., and west thereof, and Texas common points on the Texas & Pacific" for distances under 10 miles so much per 100 pounds, and pro-
20 ceeding same as the Louisiana local schedule above referred to, for same distance same rate as the said local schedule from 300 to 170 miles. In addition to the other it provides for from 500 miles and over 300 miles the rate is shown to be 20 cents per 100 pounds. This same schedule also shows that the rate on cotton seed on stations on T. & P. Ry. in Louisiana, Melville and west to El Paso was 35 cents per 100 pounds, and from stations east of Melville it was 37 cents per 100 pounds to El Paso.

Plaintiff offered in evidence the report of the Railroad Commission in 1901, showing table of rates on cotton seed in car loads beginning at 10 miles and running down to over 280 miles, and that it is 17–½ cents for any distance over 280 miles.

Plaintiff stated that he desired to offer a part of the deposition of E. L. Sargent, and upon counsel for defendant stating that he intended to offer the whole deposition, including the exhibits attached thereto, the whole deposition was read, as follows:

My name is E. L. Sargent; age 48 years; residence Dallas, Texas; am General Freight Agent of the Texas & Pacific Ry. Co.; L. S. Thorn is Vice President and General Manager of defendant company. Abilene, Texas is a common point, and has been for a number of years, as far as business from certain defined territories east of the Mississippi river is concerned. On these particular shipments it is not what is known as a common point on account of the tariff being on a mileage basis. It is 1014 miles from Melville, La. to El Paso, Texas; Alexandria, La. and Abilene, Texas are points on the Texas & Pacific railroad between Melville and El Paso. Of the stations, to-wit: Longbridge, Moreauville, Lecompte, Moreland, Cottonport, Mansura and Evergreen, La. Lecompte and Moreland only are intermediate stations between Melville and Alexandria. Lecompte is 16 miles east of Alexandria, Moreland is
21 eight miles east of Alexandria, and both are on the main line; east of these pl-ces is the Avoyelles branch of defendant's road, and the other shipping points in question are on this branch line, and are from Alexandria the following distances respectively; Longbridge is 43-7/10 miles; Mansura is 48-3/10 miles; Cottonport is 40-4/10 miles; Moreauville is 47-2/10 miles; Evergreen is 36-3/10 miles. Longbridge, Moreauville, Cottonport, Mansura and Evergreen are located on a branch line, and are not intermediate between

Melville and Alexandria. Lecompte is 16 miles from Alexandria and 50 miles from Melville; Moreland is 58 miles from Melville and 8 miles from Alexandria. It is 561 miles from Melville to Abilene. It would be impossible to state specifically all articles covered by classes A. B. C. D and E. as they are too numerous to mention, but are all shown in the western classification. In September, 1901, the defendant published in J. B. 4243-H; Southwestern Committee tariff 12-D; I. C. C. 194, rate of 35 cents per 100 lbs. on cotton seed, car loads, from Melville to El Paso; this rate being intended to cover shipments of cotton seed destined to Mexico, and it was specifically stated that the rate was not to apply to shipments destined to intermediate points. In September 1901, the Texas & Pacific Ry. Co. published a mileage scale of rates on cotton seed in car loads, minimum weight 40,000 lbs. per car, between points on its line, Alexandria, La., and west thereof, and points on the Texas & Pacific Ry., Abilene and East, the rate being 20 cents per 100 lbs. for distance of 500 miles and over 300 miles, which rate would apply from Alexandria to Abilene. It is a fact that in September, 1901 the defendant published a mileage scale of rates, in cents per 100 lbs. on cotton seed, car loads minimum weight 30,000 lbs. per car, between stations on its line in Louisiana, to wit; from 10
22 miles and under, 5 cents per 100 lbs.; 10 to 20 miles 6-1/4 cents per 100 lbs., 20 to 30 miles, 7-1/2 cents per 100 lbs.; 30 to 40 miles 8-3/4 cents per 100 lbs., 40 to 50 miles 10 cents per 100 lbs.; 50 to 60 miles, 11 cents per 100 lbs.; 60 to 70 miles 12 cents per 100 lbs.; 70 to 80 miles, 12-1/2 cents per 100 lbs.; from 80 to 90 miles, 13 cents per 100 lbs.; 90 to 100 miles, 13-1/2 cents per 100 lbs. The rates to Alexandria would be as follows: from Longbridge, Moreauville, Cottonport and Mansura, 10 cents per 100 lbs. Lecompte, 6-1/4 cents per 100 lbs.; Moreland, 5 cents per 100 lbs.; Evergreen, 8-3/4 cents per 100 lbs., and a shipper would be entitled to such rates from the points named, to Alexandria, but would not be entitled under said scale of rates to a rate of 20 cents per 100 lbs. on cotton seed, in car loads, from Alexandria to Abilene. There being no special commodity rate on cotton seed, in car loads, in effect in September, 1901, from Longbridge, Moreauville, Lecompte, Moreland, Cottonport, Mansura and Evergreen to Abilene, Texas, class A. rate of 67 cents per 100 lbs., applied, in accordance with the published tariff and classification, and the charges should have been collected accordingly, and if a charge of 67 cents per 100 lbs. was collected it was because it was the published rate and it was not in excess of the published rate; the tariff covering which was published by the defendant, and was on file with the Interstate Commerce Commission. A report made by me to L. S. Thorn, First Vice President & General Manage- of T. & P. Ry. Co. dated December 4, 1901, I think answers all other matters inquired about in this interrogatory, said report being as follows:

Dallas, Texas, December 4, 1901.—Mr. L. S. Thorn, First Vice President & General Manager, T. & P. Ry. Co., Dallas Texas. Dear
23 sir: Returning herewith communication from Hon. Judson C. Clements, Commissioner Interstate Commerce Commission, in regard to complaint of Abilene Cotton Oil Co. of alleged

over-charge on cotton seed from Louisiana points, have to advise that our information is that the Abilene Cotton Oil Co. have filed suit against this company for these alleged over-charges. However, the facts surrounding the movement of these cotton seed shipments are as follows: Complainants state, in effect, to the Hon. Interstate Commerce Commission, that during the season of 1899 (which please note was season before last) they had a rate of 22½ cents per 100 lbs. from Avoyelles Railway points and a rate of 20 cents per 100 lbs. from Bunkie, La., to Abilene, Texas. This is true, in so far as rates from Avoyelles Railway points was concerned, but the tariffs on file with the Interstate Commerce Commission will prove that it was untrue in regard to the rate from Bunkie. As a further proof of this, we attach copies of our letter marked exhibit A, sent to Mr. John Guitar, Jr., Manager Abilene Cotton Oil Co., on April 10, 1900, the papers in regard thereto being recorded under claim file 554, and authority 50219. As that letter clearly indicates, the Abilene Cotton Oil Co. fully understood that they had no rate from Bunkie, La., and further, they stated that they would not buy seed at that point. The same letter further throws a side light on the previous transaction, and indicates that we had considerable trouble with them when the rate was originally established on account of needless misunderstanding on their part. Complainants further aver that the second season afterwards they went to the agent at Abilene and asked him if there had been any change in the rate. If they asked such a question of the agent at the beginning of this season, it is probable that they led him to believe that they referred to the season just passed, and if the agent said there had been no change in
24 the rates this season as compared to last season, he was correct, as will be shown hereinafter. We do not believe that the Abilene Cotton Oil Co. asked the agent at the beginning of this season, if there had been any change as compared with those in effect the second season back, receiving an answer from him that there had been no change. In addition to this it is not clear to us why the Abilene Cotton Oil Co. should have gone to the local agent at Abilene for this information, as the correspondence attached hereto will serve to show that complainants have heretofore transacted all of their business through this office, in so far as freight rates are concerned. However, admitting for the sake of argument that the Cotton Oil Co. did ask the agent at the beginning of this season if there had been any change in the rate on cotton seed, compared with those in effect the second season back, if the agent stated there had been no change he was clearly in error, as the tariffs on file with the Interstate Commerce Commission, and posted in the depot at Abilene, clearly shows that the 22½ cent rate from Avoyelles Railway points was cancelled Feb'y 28, 1900. In addition to the legal publication of the tariff, and posting it as required by law, we took the additional precaution of notifying the Abilene Cotton Oil Co. on Jan'y 15, 1900, of our purpose to cancel this rate, effective Feb'y 28, 1900. See enclosed copy our letter, dated Jan'y 15, 1900, marked exhibit B. In addition to specifically notifying the Abilene Cotton Oil Co., the Interstate Commerce Commission were notified under date Jan'y

23, 1900, by George W. Cole, Chairman Southwestern Freight Committee (by rate notice I. C. C. A.-3855), which was confirmed by issuance of supplement 41 to Southwestern Freight Committee tariff 12-B (supplement 41, I. C. C.-112), which issues are on file in the office of the Interstate Commerce Commission at Wash-
25 ton. From this it will be seen that every possible precaution was taken to see that the public in general, the Abilene Cotton Oil Co. in particular, and the Interstate Commerce Commission, were promptly and properly advised of this change, the same being put into effect in accordance with legal requirements. There is also attached some correspondence which will give the Honorable Commission an inkling of the difficulties that we have had as between the Texas mills and Louisiana mills, concerning cotton seed rates. The Texas Railroad Commission objects to Texas seed being drawn to Louisiana mills, and the Louisiana Commission objects to Louisiana seed being drawn to Texas mills, and as you know, it has been very hard for the railroad to satisfy both factions. There is also attached extract copy of a communication which was furnished us during this season, which shows some of the difficulties between the Texas mills and the Louisiana mills in regard to the competition between them in buying seed. In addition to the above facts, will state that Mr. John Guitar, Manager of the Abilene Cotton Oil Co., was in this office, Saturday, September 28, 1901, and was given a copy of the published tariff. His attention was specifically called to all of its provisions, and particularly to that part of it showing that we had no commodity rate from points east of Alexandria. He was cautioned against any mistake in regard to freight rates. We did this simply as a precautionary measure on account of difficulties we had with Mr. Guitar during previous seasons. Our tariff in effect this season does not make any commodity rate from points east of Alexandria. This was also the case *last season*, therefore, the only legal rate from that territory in class A, which has been assessed on the shipments in question, and had Mr. Guitar exercised ordinary business precaution the complications doubtless would not have arisen. In so far as the 35 cent and 37 cent rate to El Paso
26 are concerned, from certain points on our own line in Louisiana, will say they were established some years ago, to apply simply as our proportion or division on through shipments going to points in old Mexico. So far as we know, there has been no business moved to such destination during the past several seasons. Will also state, for your information, that the tariff covering these rates does not carry the "intermediate clause," but to the contrary, specifically states that its application is specifically from and to the actual points specified. Therefore, the fact that Abilene is intermediate to El Paso would have no direct bearing on this tariff. We note that complainants further aver that they have been discriminated against in securing equipment in which to load their shipments. This charge we specifically deny, and it was only to day that the manager of a large local mill in Louisiana was in the office and stated that the Abilene Cotton Oil Co. had been able to get cars as promptly as any other shippers, and in fact he stated that there

had been numbers of cases in which his mill has been much more delayed than the Abilene Cotton Oil Co. in securing equipment, this being due to the usually heavy movement of business during the cotton season. Yours truly, E. L. Sargent, General Freight Agent." The entire letter was read as stated, with the understanding that the court would consider only such portions of same as were shown to be admissible.

In order to obtain advantage of the combination of locals, it would be necessary to make two distinct local shipments. If Abilene was shown as the correct destination on first shipment, the combination of locals would not apply, but the through published rate from originating point to actual destination would govern, which in this case would have been 67 cents per 100 lbs., and this rate should have been charged, and if it was charged it was the published
27 tariff rate applying on such shipments.

Cross-examination:

There was no contract made for rate of freight on cotton seed from points in Louisiana to Abilene by me with the plaintiff, further than a quotation of the published tariff rate, as on file with the Interstate Commerce Commission.

Plaintiff offered in evidence the dates of the several bills of lading for the shipments in question, each being executed by def't in the year 1901, as follows:

Way bill No.	37,	dated	September	23,	from	Longbridge.
" " "	61	"	"	26	"	Lecompte.
" " "	47	"	"	27	"	Longbridge.
" " "	29	"	"	17	"	" "
" " "	35	"	"	23	"	Longbridge.
" " "	21	"	"	26	"	Evergreen.
" " "	32	"	"	23	"	Moreauville.
" " "	19	"	"	20	"	Mansura.
" " "	51	"	"	21	"	Cottonport.
" " "	14	"	"	25	"	Moreland.
" " "	32	"	"	20	"	Longbridge.

Plaintiff offered in evidence the bill of lading from Cotton ——, dated September 26, car 8722, showing that the same was issued by the Texas & Pacific Railway, and that "Avoyelles Railroad Co." was scratched out, and Texas & Pacific Ry. Co. written in place of it. Each bill of lading from all points executed by defendant Co.

Defendant offered in evidence the deposition of E. A. Moseley, as follows:

My name is Edward A. Moseley; residence Washington D. C. am Secretary of the Interstate Commerce Commission; am the executive officer of the Commission, and its records are in my custody.
28 The Texas & Pacific Ry. Co. has not, individually, filed with the Interstate Commerce Commission under section 6 of the Act to regulate Commerce, a schedule of rates, fares and charges fixing the rate of freight on cotton seed from Alexandria, La. west into Texas as far as Abilene. That railway company was a party to

a joint tariff published and filed with the Commission by the Southwestern Freight Committee, Geo. W. Cole, Chairman, entitled "Southwestern Freight Committee Tariff, No. 12-D, I. C. C. No. 194" effective Jan'y 25, 1901 and filed with said Commission Jan'y 25, 1901, by chairman of said Committee. That tariff was cancelled November 6, 1901, by "Southwestern Tariff Committee Tariff No. 12-E, I. C. C. No. 228," filed November 2, 1901. The said Texas & Pacific Ry. Co. was and is a member of the Southwestern Tariff Committee, which is the successor of the Southwestern Freight Committee, and of which Mr. Geo. W. Cole is also chairman. Said last named tariff is still in force. The Texas & Pacific Ry. Co. has filed with the Interstate Commerce Commission, general concurrence in the tariffs published and filed by both of said committees. Each of the tariffs above mentioned names mileage rates on cotton seed, in car loads, moving between points "Alexandria, La., and west thereof, and Texas common points on the Texas & Pacific Railway." The highest of said mileage rates so named is 20 cents per 100 lbs., which applies to distances of 500 and over 300 miles. No mileage rate is specifically provided in said tariffs, for any distance over 500 miles. The distance from Alexandria, La. to Abilene Texas is 514 miles. Whether the said mileage rate of 20 cents per 100 lbs. for 500 miles has been regarded and applied by the Texas & Pacific Ry. Co. as a maximum charge to Texas common points can not be answered by me. The mileage rates on cotton seed are as above stated,
29 named in the tariffs to apply between Alexandria and points west thereof to Texas common points on the Texas & Pacific Railway, and it may be that the 20 cent rate for 500 miles could properly be construed to apply as a maximum charge to common points in Texas. It appears from the tariffs issued by the Texas Railroad Commission on Cotton seed, in car loads, and on file with the Interstate Commerce Commission, that the mileage rate for a distance of 14 miles over a single line of road is six cents per 100 lbs. If the said mileage rate of 20 cents per 100 lbs. named in the aforesaid tariffs of the Southwestern Freight Committee and Southwestern Tariff Committee is limited to distances of not over 500 miles, the through rate to Abilene, Texas, might be determined by adding the rate of the Texas Railroad Commission for the distance in excess of 500 miles, which excess distance is 14 miles, and the through rate upon that basis from Alexandria to Abilene would be 26 cents per 100 lbs. The class rate on cotton seed, in car loads determined by class A of the Western Classification from Alexandria to Abilene is 67 cents per 100 lbs. as shown in Southwestern Freight Committee tariff No. 8-E. I. C. C. No. 202, effective March 5, 1901, and Southwestern Tariff Committee tariff No. 8-F., I. C. C. No. 224, effective October 5, 1901, which tariffs are on file with the Interstate Commerce Commission, and which last named tariff is still in force. The Texas & Pacific is a party to and represented in said last named tariffs. The schedule or tariffs above described were in force during the month- of August, September, and November, 1901, and the rates above set forth are still in force, copies of the schedules or tariffs above mentioned are hereto attached and marked respectively A, B, C and D.

There are no schedules of tariffs showing special rates on
30 cotton seed during the year 1901, or at the present time,
March 31, 1902, from any point on the Texas & Pacific Railroad east of Alexandria to points on that railroad in Texas. The points mentioned, to-wit: Longbridge, Moreauville, Lecompte, Moreland, Cottonport, Mansura and Evergreen, La., and all situated upon defendant's main line and Avoyelles Branch east of Alexandria. The class *a* rate of 67 cents per 100 lbs. above mentioned, is in force between such points. Rates from these points might, however, be made by combination of the Louisiana State rate from such points of shipment to Alexandria, and the rate from Alexandria to Abilene, but what the local rates on cotton seed from such points to Alexandria are, does not appear in any schedule or tariff on file with the commission. From October 25, 1899, to Feb'y 28, 1900, there was in effect as appears by a tariff on file with the commission, a through rate on cotton seed, in car loads, from points on the Avoyelles Branch of the Texas & Pacific Railroad to Abilene, Texas, of 22½ cents per 100 lbs. This rate was cancelled on the date last named, and since that time there has not been in force any through rate on cotton seed from those stations to Abilene.

Tariffs Nos. 8-E, I. C. C., No. 202 & 8-F, I. C. C. No. 224 described in the deposition of E. A. Moseley show no commodity or special rate on shipments of cotton seed from points east of Alexandria to Texas points from all points east of Alexandria the rate for class A being 67 cents per 100 lbs. to Abilene Texas; cotton seed being described as class A in the western classification. It was admitted by counsel for plaintiff and defendant, that the tariffs & classifications mentioned in the deposition of E. A. Moseley have been published in book and pamphlet form and that copies have been
filed in the T. & P. office at Abilene for the inspection of the
31 public, and that they were filed at the time of these shipments, and were also file- in T. & P. offices at the points of origin of the shipments but as to whether or not they were properly filed and published is not admitted.

G. S. Maxwell, a witness for Defendant testifies as follows:

I reside in Dallas, Texas; I am chief clerk in general freight office of the Texas & Pacific Railway Company, and held the same position in September and October, 1901; as such chief clerk I assist in the making, issuing and keeping up generally with freight rates. A commodity rate is one that is provided for a special movement of freight, and an exception to the general application of rates. A class rate is one provided for general application between all points specified in any particular tariff. Abilene is what is known as an interstate Texas common point. In September and October, 1901, the Interstate Commerce rate on cotton seed in carloads from New Orleans and all points up to but not including Shreveport, La., to Abilene, Texas, was 67 cents per 100 lbs., and took what was known as class A. That same class rate applied (except where otherwise specifically provided) from all points up to but not including Shreveport. There was a special rate put in on cotton seed from Alexandria

and points west, but not from points east of Alexandria *and points west, but not from points east of Alexandria;* that is what would be called a commodity rate. A special or commodity rate means an exception to the general or class rates. A great many other articles took class A rates, besides cotton seed; I never undertook to count the number of articles taking class A rates, but I know there must be several hundred of them. At the time of these shipments the rate on class A from any point between New Orleans and Shreve-
32 port to Abilene was 67 cents per 100 lbs., unless a special rate had been put in. With a few exceptions, the Railroad Commission of Texas has adopted the same classification as the Western Classification; at this time the Texas Railroad Commission rates were based on certain differentials under the rates from New Orleans their rates are on a mileage scale and run up to what was known as a maximum rate for something like 240 miles and over this distance the rate is a blanket rate, and is the same to all points. For illustration, class A from New Orleans to Texas common points would be 67 cents per 100 lbs., unless there was a special exception made. On the rates on same class of articles from Galveston and Houston, under the railroad Commission of Texas, to Texas points, I think the differential is something like nine or ten cents per 100 lbs. less than the rate from New Orleans, and this would make the Galveston and Houston rate approximately 60 cents per 100 lbs. to Abilene, while the Texas & Pacific rate on class A from New Orleans to Abilene would be 67 cents per 100 lbs. Unless a special rate was made on cotton seed, the rate on it from Galveston and Houston would be, approximately, 60 cents to Abilene, but I think the Texas Railroad Commission had put a special rate on cotton seed, and the maximum was, I think, 17½ cents per 100 lbs. As already stated, there are several hundred articles which takes class A, and the Texas Railroad Commission has put on special rates covering but very few of them; I would say not more than two or three per cent. of them. As I understand it, under the Texas Railroad Commission Tariffs, the rate on the majority of articles in class A from Galveston and Houston to Abilene would be approximately 60 cents per 100 lbs. Special rates are usually put in, based on commercial necessity and
33 competition. I don't know of better example *that* the Abilene Cotton Oil Company, plaintiff in this suit; in certain seasons or certain years, they find it difficult to obtain sufficient cotton seed to run their mills, and must go to points further remote from what might be considered the territory tributary to Abilene, and in some cases it may be necessary to go out of the State, and these commodity rates on this particular item from Louisiana points are put in for the purpose of assisting the Texas Oil Mills when they are unable to secure sufficient cotton seed. In this case the commodity rate was not put in further east than Alexandria. The rate on cotton seed from Alexandria to El Paso was 35 cents per 100 lbs., in car loads. El Paso is not a point where cotton seed are consumed, and these seed were destined to Mexico, and this rate was put on for the purpose of enabling the cotton planters of Mexico to obtain seed for planting purposes; a special rate was made for them for that purpose. Under

the general custom of publishing rates from points in this country to Mexico, the rate is published to the border points instead of publishing a division sheet showing the divisions of the through rate, and this 35 cents per 100 lbs. to El Paso on cotton seed represented the division of the through rate occurring to the lines north of the Republic of Mexico. This rate did not apply to intermediate points, but on the contrary there was a special reservation made that it was not to apply to intermediate points.

The question of what it costs a railroad per ton per mile to handle freight is a very difficult one, and it is hard to answer. The cost is based on a number of things. The cost of transporting any particular commodity will vary materially with the nature of the commodity, and oftentimes railroads make a special rate on
34 some particular commodity between given points, based upon some commercial necessity that might arise at that particular point; or, in other words an emergency, and this rate would not represent on its face a profit-bearing rate, but is made in connection with other circumstances to enable the people at that particular point to transact their business, and the railroad derives its benefit from the prosperity of the people, increased business, rehandling of products, etc., that is, gets a return indirectly instead of direct return from the first haul. There are a good many commodities transported at different times of the year at figures which are unprofitable, but the transportation leads up to a class of business out of which the railroads may make some revenue. The product of the oil mill and the increase in weight of the cattle to which the seed were fed, and the general prosperity injected into that community would have a general bearing on the matter. I have no means of telling the exact net cost of transporting a ton of cotton seed per mile; the accounting department of the company takes care of and figures out such things. I don't think there is a railroad man in the country who could answer that question off-hand, because it is so far-reaching that it would be impossible to give a definite reply to it without having a mass of statistics and other information which it would take a week to wade through.

The bulk of the cotton seed from points around Alexandria are consumed by the oil mills in Louisiana, and it takes, generally, a short haul, and the rates in such cases are under the jurisdiction of the Railroad Commission of La. I do not now remember the exact figures, but in comparison with the rate to Abilene, the rate on these short hauls in Louisiana I think is somewhat higher than the rate to Abilene; the margin between the maximum and minimum under the Texas Railroad Commission I think is not very wide,
35 and they lead up to a maximum right quickley. My recollection is that the rate on cotton seed, under the Texas Commission, for a distance of 20 or 30 miles is 6 or 7 cents per 100 lbs. I don't remember what distance is reached under the Texas Commission Tariff, before its rate of 17½ cents per 100 lbs. on cotton seed would be applied, but my impression is that it is something like 150 or 200 miles. There is a stated difference between the Interstate Commerce Commission rates and the Texas Railroad Commis-

sion rates to Texas common points, as I have already stated, called differentials. On articles in class- A and B for instance, there is a stated difference that is of a good many years' standing, which is suppo-ed to equalize the various markets in this particular field of consumption. All of the Texas Commission class rates (from first class to class E) are based on certain stated figures, which are termed "differentials," under the rates in effect from New Orleans to the same Texas points. These figures were fixed after a thorough investigation of the commercial conditions at both places in order to enable the business men to handle the same lines of business and compete with each other in these markets of consumption. Alexandria is not a competitive point in the general acceptation of that term. It is as applied to what I have just said as regards the application of rates from Galveston, but it is however, a competitive point in the sense that there are a number of lines centering there which compete for the same lines of business. The railroad lines there competing with the Texas & Pacific, I believe, are the Southern Pacific and the Iron Mountain; generally speaking the Southern Pacific parallels the T. & P. from New Orleans and Alexandria, to El Paso. Prior to October 27, 1900 the rate on cotton seed from Alexandria to Abilene I think was 20 cents per 100 lbs.
36 On the latter date this rate was restricted to the territory west of Alexandria. Mid. Texas is in what is known as a differential territory, and takes a figure four or five cents higher than that prescribed for Abilene in the tariff. It is impracticable to publish and post the different rates without putting them into classes, and printing them in tariffs; it would be impossible to provide facilities for posting them. For example, we have at the present time in use on interstate business, something like 2500 different tariffs, that range in size from a single sheet to tariffs containing 100 or more pages, and a mental calculation will show you at once that it would be absolutely impossible to post that amount of information for the use of the public in separate sheets; it would require a bill board extending for miles.

Cross-examination:

I think the rate of 22½ cents from the stations on the Avoyelles road was put in a year or two prior to the time of these shipments; it is my understanding that this rate was put in from a commercial necessity, and withdrawn for the same reason; it was cancelled because we were threatened by the Louisiana Railroad Commission with a reduction of our rates in Louisiana unless the application of interstate rates was restricted to territory further west. Complaint had been made to that Commission by the Louisiana oil mills that we had permitted these Texas people to go there and buy cotton seed, and thereby create a commercial condition in their vacinity that was detrimental to their business, and the rate was then changed, and class A made to apply. Our purpose in making the change was not necessarily to keep the plaintiff and other Texas mills out of that territory, but was to provide a higher basis of rates from
37 points east. I don't know that at that time we believed that the change would prove to be prohibitive; it appears that it

was not prohibitive, as the parties did not stay out of that territory; I received my instructions usually from Mr. Sargent, the general freight agent; I do not know what his motives were. Upon receiving these instructions, to change the former rates and to make those A rates apply, I do not remember that I personally wrote to the Southwestern Committee about the change, or made any representations at all to that committee, however, it was notified of the change, and that committee acted merely as our agent in publishing the rate. The rate emanated from the Texas & Pacific road. Mr. Cole is the chairman of the Committee, and he received the information or data for the tariffs from us; we made no representations at all to Mr. Cole as to the reasons for the change, upon our request he makes the change, and makes the proper showing to the Interstate Commerce Commission, and in that way the cancellation was made. I don't know that the Interstate Commerce Commission makes any investigation as to the merits of the rates; we furnished them no reason for the change; we sent them copies of certain issues which they asked us for some time after this suit was filed; we did this because they asked us for duplicate copies of the issues they had on file. As already stated, unless there be a special or commodity rate, cotton seed, in car loads, goes at class A rate; there are many other rates higher than class A, to-wit: first class, double first-class, and so on; there are some articles which railroads decline to handle at any rate; for instance, dynamite; to some extent the risk assumed during the transportation, determines the classification. All machinery does not take class A rate. As to the risk encountered in handling
38 cotton seed, it is a commodity which requires a special line of equipment. We can handle machinery on flat cars, but not cotton seed, in short, we have to have a car that will hold seed; outside of this, and the ordinary risk attending transportation, such as derailment, collision, etc., I do not recall any other risk or danger in the transportation of cotton seed. I think the 20 cent rate on cotton seed from Alexandria and points west to Abilene, is still in effect; I don't remember now just how the tariff stood on that point last year; I don't remember the rate on cotton seed from Texarkana to El Paso, under the Texas Railroad Commission's tariff, or whether it is 17½ cents, or whether there was any differential provided on that or not; I think the distance from Texarkana to El Paso is about 850 miles. The rate of 35 cents on cotton seed to El Paso, already mentioned, is what the Texas & Pacific would get on such shipments, and the other road handling the shipment from El Paso would get whatever it charged. There is no rate fixed from Alexandria and Melville to points in Mexico. The effect of this 35 cent rate to El Paso might be considered as a local rate to El Paso, if it were not for the fact that there is absolutely no consumption of cotton seed at El Paso. If I remember correctly, the rate on cotton seed meal from Abilene to New Orleans is 25 or 30 cents per 100 lbs. Nothing goes to Westwego, except what is exported, and on export business we apply a through rate. What a through export rate would be would depend upon what the rate was from Galveston; a through rate from Abilene to Hamburg, for instance, would be on

the basis of a combination of the rates through Galvestion, that is the rate from Abilene to Galveston, plus the rate from Galveston to Hamburg. Westwego is 8 miles west of New Orleans, and is the Texas & Pacific terminal for handling export business. You will find in the classification that the Texas Railroad Commission desig-
39 nates cotton seed as class A; they do not publish their classifications in the tariff book which you have been examining, but they adopt the Western classification. They take cotton seed out of class A, however, by their mileage rate basis.

Redirect examination:

In handling cotton seed we must have such equipment as will keep the seed dry. Some lines of furniture are in class A; furniture is shipped in all the classes; it depends upon how it is loaded, how packed for shipment, and the nature of the piece of furniture; it runs all the way from first class to class A; this is true, to some extent, as to machinery; textile machinery takes a higher rate than agricultural machinery or saw mill machinery. As already stated, the oil mill men of Louisiana complained to the Louisiana Commission, and we were threatened with a reduction of our rates in Louisiana, and the interstate rate east of Alexandria was withdrawn, but it remained the same from all other points including Alexandria and west. I now take the classification attached to the deposition of E. A. Moseley, and at your request explain to the court where we find the rate on cotton seed from Alexandria to Abilene in September and October, 1901; see item 34 on page 7 of the tariff, cotton seed in car loads, 40,000 lbs., 500 miles 20 cents. The rate from points east of Alexandria is shown in another tariff; that is found in item 5, 6 and 8 of this (another) tariff, pages 4, 17 and 20. It shows class A rate 67 cents from all points east of Shreveport, except where otherwise specially provided, but it would not apply from Alexandria, as there were special rates provided from that point, but it would apply from Cottonport and those other points.

Recross examination:

40 This tariff was effective March 5, 1901. At your request I take the tariffs and classifications, and explain to the Court how the rate from Cottonport, or any of the stations mentioned, to Abilene, could have been ascertained; on page 98 of the Western Classification No. 32, T. & P. classification No. 54-H, cotton seed is provided for at class A rate, T. & P. tariff J. B. 4270-H, Interstate Commerce Commission No. 202, applying from New Orleans to Texas common points, page 4, Abilene is designated as taking class rate basis No. 90. On page 17 of the same tariff, item No. 6, section C, provision is made for the application of the same rate from all points on the T. & P. and Avoyelles railways in Louisiana east of Shreveport. On page 20, item No. 8, rate basis No. 90 provides rate of 67 cents per 100 lbs. for class A. To ascertain that there is no commodity rate on cotton seed, you refer to the commodity side. I could not undertake to analyze the intelligence of a man inquiring for a rate in these tariffs, or say how a stranger, knowing nothing

about them, would proceed to get the desired information from them. In order to ascertain the classification and rate on a given article between two points, I think a man would have to possess some general knowledge and familiarity with such matters. These tariffs are furnished to business men all over the country, and are used by them regularly in ascertaining the rates and in ordering their goods. Defendant has not established or published any individual tariff, rate or schedule from points on its line in La. to points on its line in Texas, except the tariffs, rates and schedules referred to by me and in Moseley's deposition. I know of no other easier or better way in which these rates could be prepared for the public to understand them; they are supposed to have been issued by people who
41 have had a great many years experience in such matters, and in trying to get it up for their own and the convenience of the public. Tariffs of this kind have been in use since beyond my experience of 25 years with them. The classification referred to by the witnesses in behalf of defendant is styled the Western Classification No. 32 of rules and conditions, taking effect August 1, 1901, and shown by indorsement thereon to be adopted by 90 odd railroads in Western, Southern and Central portions of the U. S., and is dated July 21st, 1901. This book consists of 124 pages of classifications, and on page 98, under the head of Seeds is found the following entry: "52 cotton, Min. C. L. Wt. 24,000 lbs. 3-A." over the column containing the "A" are the letters "C. L." On the 6th page of the classification appears this: Explanation of Characters. The figures given after articles signify: 1-First Class. 2-Second Class. 3-Third Class. 4-Fourth Class. 5-Fifth Class. Classes A. B. C. D and E. refer to table of rates C. L.-car load." In this book there are no rates, nothing but classifications. On the front of this classification is stencilled the following: File for Public Inspection. El Paso Route. The Texas and Pacific Railway Co. The Denison & Pacific Suburban Railway Co. Freight Traffic (Texas and Pacific) Department Classification No. 54-H cancels classification No. 51-H, on Interstate Business. Applicable on Interstate Traffic only. Note. Supplement will be duly issued by this office authorizing the application of these rulings within the States of Louisiana and Texas on receipt of authority from Railroad Commissioners. Notice:—This classification must not be used to make rates on articles governed by exceptions to western classifications applicable to Louisiana and Texas Traffic." This stencil indorsement being signed by Braggins, Redfield and Sargent in behalf of and as representatives of defendant
42 company. This classification purporting to be issued by the western classification Committee, F. W. Meadows, secretary, and J. F. Ripley, chairman, at Chicago, Ill. The tariff rates referred to by witness Maxwell, is styled; "South Western Freight Committee. Tariff No. 8-E. of the Choctaw, Oklahoma & Gulf R. R., Houston & Shreveport R. R., Kansas City Southern Ry. Co., St. Louis Southwestern Ry., and St. Louis & San Francisco R. R. in connection with." Here follows a list of 41 railroads, the defendant road being one of the 41; the indorsement then proceeds; "Effective (except as noted) at once. Rates, Rules and Regulations applying on freight forwarded between New Orleans, La., and Points Taking Same Rates,

and Texas Stations named, subject to the Western Classification and Exceptions Thereto as named in classification exception series No. 1." Being signed by Mr. Sargent for defendant along with other roads. This purports to be supplement No. 15, and is dated St. Louis, Mo., May 30th, 1901, and is signed "Geo. W. Cole, Chairman. 2 This is known as Tariff J. B. 4270-H, and on pages 4 to 16 are names of many towns in Texas, preceding said list of towns is this: "Index To Texas Points. Points of Destination, Location and Rates. Notice.—All stations numbered 90 on classes and 165 on commodities from New Orleans take Common Point Rates." Then follows thus.

Station.	Railroad Location. Class. Basis No.	From New Orleans. Commodity Differential. Basis No.	Basis No.
Abilene.....	Y..... 90	165	

An index at bottom of paging shows that "Y" stands for T. & P. Ry. Co. On page 17 under heading Application of Rates From Points Of Origin under item. No. 6 section C, referred to by witness Maxwell, is this: (C) Texas & Pacific Ry. New Orleans rates will apply from Port Allen, Chamberlain, Glynn, Lobdell, New
43 Roads, Napoleanville, Plattenville, Bell Alliance and all stations on T. & P. Ry. in Louisiana east of Shreveport, La. also between Mansfield, La. and Texas points with maxim *a of* combination of locals through Shreveport or Mansfield Junction.

New Orleans rates will apply between all stations in Texas on T. & P. Ry. and stations on the Avoyelles Ry. in Louisiana. Then follows rates in connection with Natchitoches Ry. New Orleans Texarkana rates will apply as maxima on traffic to intermediate Texas stations on the T. & P. Ry. where rates are higher. (It then makes New Orleans rates apply between Vicksburg Miss. and Texas points.)

Combination of locals through houston, Texas or Shreveport, La. will apply as maxima on traffic from New Orleans and intermediate points."

The above is a correct copy of said section (C) in so far as it designates Louisiana points and the rates thereon to Texas points.

On page 20 of this tariff is found No. 90 it being intermediate between similar numbers from 1 to 164 and by continuing the line in connection with No. 90 under class A the rate of 67 cents per 100 pounds is found. On pages 21 to 26 under head of commodity rates same runs from Nos. 9 to 79 and then begins at 166 and continues consecutively to several hundred. There is no key accompanying this tariff.

The tariff also provides for cotton seed "via Texas & Pacific Ry. Co. Cotton seed, moving between points, Alexandria, La., and west thereof, and Texas common points on the Texas & Pacific Ry." same as the similar tariff furnished by Mr. Redfield to Mr. Guitar and referred to in connection with Mr. Guitar's testimony.
44 The schedule and classification mentioned by witnesses Sargent, Maxwell and Moseley being introduced by defendant. (Plaintiff objected to all the testimony of witnesses for defendant wherein they undertake to testify as to the contents of the

schedules and classifications because the schedules and classifications were the best evidence as to their contents; the court so held but permitted the testimony of said witnesses to be introduced, not as evidence of the contents of said instruments but as explanatory thereof only.)

Plaintiff read in evidence the deposition of W. M. BARROW as follows:

My name is Wylie M. Barrow; age 38 years; residence City of Baton Rouge, La. I am Secretary to the Railroad Commission of Louisiana, and as such keep the records and files of said Commission. November 16, 1900, the Railroad Commission of La. fixed a schedule of rates on cotton from a number of points on the Texas & Pacific Railway, to-wit: Ravenswood, Fordoche, Maringourin, Rosedale and Grosse Fete to New Orleans; the distance from the several points named to New Orleans, and the rates fixed being as follows: Ravenwood to New Orleans, 124.8 miles, rate 11 cents per cwt.; Fordoche to New Orleans, distance 117.5 miles, rate 11 cents per cwt.; Maringouin to New Orleans, 107.5 miles, rate 10 cents per cwt.; Rosedale to New Orleans, 103.7 miles, 10 cents per cwt.; Grasse Tete to New Orleans, distance 100 miles, rate 10 cents per cwt.. These rates are still in effect, and became effective in November, 1900, and applied during the year 1901. There was no change made during 1901 or 1902. The Railroad Commission has not issued any other tariff applying on cotton seed for this road except a general tariff applying on cotton seed for planting purposes, which applies to all roads in the State.

45 Cross-examination:

There has not been, nor is there now (March 24, 1901), any general tariff of rates on cotton seed applying on all lines in the State of Louisiana, fixed by the Commission. In September, 1901, the rates on cotton seed, in less than car loads, between points on the Texas & Pacific Railway in Louisiana, and for planting purposes were as follows:

10	miles	and	under,	5	cents	per	100 lbs.
30	"	"	over 20,	7½	"	"	"
20	"	"	" 10,	6¼	"	"	"
40	"	"	" 30,	8¾	"	"	"
50	"	"	" 40,	10	"	"	"
60	"	"	" 50,	11	"	"	"
70	"	"	" 60,	12	"	"	"
80	"	"	" 70,	12½	"	"	"
90	"	"	" 80,	13	"	"	"
100	"	"	" 90,	13½	"	"	"
110	"	"	" 100,	14	"	"	"
120	"	"	" 110,	14½	"	"	"
130	"	"	" 120,	15	"	"	"
140	"	"	" 130,	15½	"	"	"
150	"	"	" 140,	16	"	"	"
160	"	"	" 160,	16½	"	"	"
170	"	"	" 160,	17	"	"	"
300	"	"	" 170,	17½	"	"	"

From Longbridge to Alexandria is 43.7 miles, and the rate 10 cents per 100 lbs.; Mansura to Alexandria is 48.3 miles, and the rate is 10 cents per 100 lbs.; Lecompte to Alexandria, distance is 16.1 miles, and the rate is 6¼ cents per 100 lbs.; Moreland to Alexandria is 7.5 miles, and the rate 5 cents per 100 lbs.; from Cottonport to Alexandria is 40.4 miles, and the rate is 10 cents per 100 lbs.;
46 Moreauville to Alexandria is 47.2 miles, and the rate 10 cents per 100 lbs.; from Evergreen to Alexandria is 36.3 miles, and the rate is 8¾ cents per 100 lbs.

We, the parties to said cause do hereby agree that the foregoing is a full and complete statement of all the facts introduced in evidence on the trial of the cause mentioned in the caption hereof to-wit: Abilene Cotton Oil Co. *vs.* T. & P. Ry. Co. No. 1644, in the District Court of Taylor County, Texas.

HARDWICK & HARDWICK,
Attorneys for Plaintiff.
J. M. WAGSTAFF,
Attorney for Def. T. & P. Ry. Co.

Examined and approved and ordered filed as a statement of the facts in trial cause.

J. H. CALHOUN,
Judge Pending & Judge of 42nd Judicial District of Texas.

Endorsed: No. 1644. Abilene Cotton Oil Co. *vs.* T. & P. Ry. Co. Statement of Facts. Filed April 16th, 1904, in term time. V. F. Womack, Clerk of District Court, Taylor County, Texas.

Court's Findings of Fact and Conclusions of Law.

Filed April 16, 1904, in Term Time.

Court's Findings of Fact.

No. 1644.

ABILENE COTTON OIL CO.
vs.
TEXAS & PACIFIC RAILWAY CO.

The Court makes the following findings of fact and conclusions of law in this case to-wit:—

Findings of Fact.

1st. Defendant is a railway corporation operating a line of railway through the States of Louisiana and Texas, from New
47 Orleans to El Paso, and that the towns mentioned in the petition are located as stated in said petition.

2nd. That Abilene, Texas, is a common point, and as such under

the schedule of rates published by the defendant the rate on cotton seed from Alexandria Louisiana to Abilene Texas was 20 cents per hundred pounds. This was a special or commodity rate.

3rd. That the towns of Cotton Port, Mansura, Moreland, Moreauville, Evergreen, Longbridge, and Lecompte are each in Louisiana and are stations on defendant's main line or branch line; and are all east of Alexandria, and at the time of the shipments in question were made the local freight rates as published by defendant and as in force between said points to Alexandria were as stated in plaintiff's petition; that is from said Moreauville, Mansura, Cotton Port and Longbridge the local rate was ten cents per hundred pounds on cotton seed to Alexandria, and from Evergreen it was 8¾ cents per 100; Lecompte 6¼ cents per 100 pounds, and Moreland 5 cents per hundred.

4th. That in September and October at the times stated in the petition there was shipped from said points above mentioned to plaintiff at Abilene over defendant's road the cotton seed described in the petition; that when same reached Abilene plaintiff was required to pay for freight on the same the sum of $3458.83 which was paid under protest by plaintiff and paid so plaintiff could obtain the seed for use in its oil mill at said town of Abilene. That defendant charged plaintiff at the rate of 67 cents per 100 pounds for such shipments. That said charge was unreasonable, unjust and extortionate. That a reasonable rate for said charges would have been the sums of said two locals, to-wit: 20 cents from said Alexandria and the local rates above named from said shipping points to said
48 Alexandria. That these rates would have aggregated on the shipments in question the sum of $1507.00; this last amount was a reasonable rate and more than that was unreasonable, unjust (and discriminative) that thereby defendant charged and received from the plaintiff the sum of $1951.83 more than a just and reasonable charge.

5th. That the said local rates were in force during the times of the shipments in question and were published and held out by defendant.

6th. That the through rate fixed and published by defendant from Melville, a point on defendant's road in La. east of all the stations above named, to El Paso, Texas, a point 413 miles west of Abilene, was 35 cents per 100 on cotton seed; all other points named being intermediate points between said Melville and El Paso.

7th. That the western Classification Committee, agent and representatives of numerous railways and of defendant, filed with the Interstate Commerce Commission what is known as the Western Classification, giving classifications of different articles or items of merchandise, and in same cotton seed is classed as "A;" that this was the joint act of a number of roads and the defendant adopted said joint classification. That on May 30, 1901, the Southwestern Freight Committee, Agent of a number of roads and agent of defendant filed with the said Commission a supplement for numerous roads, in connection with defendant, whereby the rate on cotton seed from all points in Louisiana east of Alexandria was fixed at 67 cents per 100 pounds to all points in Texas from all points in Louisiana east of Alexandria and west of Alexandria.

8th. That said classification and sais rate schedule was adopted by defendant and was filed by said S. W. Freight Committee with said Interstate Commerce Commission in behalf of defendant.

49 9th. That copies of said schedule and said tariffs and classifications were kept in the office of said defendant at said points of shipment and at said Abilene, that is, in the freight office and depots, for the inspection of the public as admitted by plaintiff which admission is found in the Statement of Facts.

10th. That other than said schedule and classification nothing has been filed with the Interstate Commerce Commission by or in behalf of defendant in the way of classifications, schedules or rates on cotton seed from points on its road in La. to points on its road in Texas.

Conclusions of Law.

1st. The facts so found show that this was an interstate shipment.

2nd. The facts so found show that the defendant complied with the Interstate Commerce Law and said rates and classifications were thereby properly established and in force except that the rate charged on cotton seed in car load lots *were* unreasonable and excessive.

3rd. I find that the rate charged by the defendant was that establishd under the Interstate Commerce Law and I find for the defendant. (Plaintiff excepts to the 2d and 3rd conclusions of law.)

J. H. CALHOUN,
Judge of 42nd Judicial District of Texas.

Endorsed: Abilene Cotton Oil Co. *vs.* T. & P. Ry. Co. Court's Findings of fact and conclusions of Law. Filed April 16th, 1904, in Term Time. V. F. Womack, Clerk of District Court, Taylor County, Texas.

50 *Plaintiff's Bill of Exceptions No. One.*

Filed April 16th, 1904 in Term Time.

Bill of Exceptions.

No. 1644.

ABILENE COTTON OIL CO.
vs.
TEXAS & PACIFIC RY. CO.

Be it remembered that in this cause the court in rendering its judgment in favor of defendant did so on the ground that the Interstate Commerce Law applied and this court was without jurisdiction in the premises to declare the 67 cent rate illegal.

And be it further remembered that plaintiff thereupon requested the court to make its findings and conclusions, which the court did, and same now appear in the record; and be it further remembered that the plaintiff at the time excepted to all that part of the court's

2nd conclusion of law wherein the court holds as follows:—"The facts so found show that the defendant complied with the Interstate Commerce Law and said rates and classification were thereby properly established and in force," because (first) The facts found by the court show that the defendant had not complied with the law in establishing, publishing and posting the schedules showing the rates and fares and charges for property which defendant had established upon its route.

(Second) The facts found by the court showed that defendant had not established any schedule of rates and fares and charges applicable to places on its line.

(Third) The facts found by the court show that nothing but a joint schedule by other roads had been established over many roads including defendant line, and this joint act of a number of roads is not the schedule required and exacted in cases such as this, for in cases involving the charges for continuous carriage from points on defendant's line to points on defendant's line requires an individual tariff and schedule and not a joint tariff and schedule.

51 (Fourth) There is no finding and no testimony showing or tending to show that the law as to establishment, publication &c., of the joint tariff and schedules had ever been complied with.

(Fifth) The facts show that the classification introduced did not and was not operative as to cotton seed from the points named.

(Sixth) There is an utter want of testimony as to the alleged schedules plainly showing or stating the places, or rates &c.

(Seventh) That the facts found show that the Interstate law was not complied with, and fail to show that defendant had complied therewith, and fail to show the facts essential to sustain or support the said conclusion.

To the Third Conclusions of Law plaintiff excepted because under the facts found plaintiff was entitled to recover, and further that there was no plea to the jurisdiction, and further that this was a suit on the common law liability of defendant, and further there was no proper plea raising the question of jurisdiction, and the same exceptions urged as to 2d. Conclusion is also made to this 3d. conclusion.

And in this connection the facts contained in the statement of facts are made part hereof. The court overruled each and all of the said exceptions, to which plaintiff excepted. By filing this bill the plaintiff does not pretermit itself from urging further objections to said conclusions. Wherefore plaintiff presents and asks that this bill of exception be allowed.

HARDWICKE & HARDWICKE,
Att'ys for Plaintiff.

Allowed, approved and ordered filed as part of the record.

J. H. CALHOUN,
Judge Presiding.

52 Endorsed: Abilene Cotton Oil Co. *vs.* T. & P. Ry. Co. Plaintiff's Bill of Ex. No. 1. Filed April 16th, 1904, in term time. V. F. Womack Clerk of District Court Taylor County, Texas.

Judgment of District Court.

No. 1644.

ABILENE COTTON OIL CO.
vs.
TEXAS & PACIFIC RY. CO.

APRIL 16TH, 1904.

On this day this cause came on for trial and the cause was submitted to the court, and the court having heard the evidence, finds in favor of the defendant; therefore it is adjudged by the court that plaintiff Abilene Cotton Oil Co. take nothing by this suit and that defendant Texas & Pacific Railway Co. go hence without date and recover all costs in this behalf expended; for all of which let execution issue, to which action of the court the plaintiff at the time duly excepted and duly excepted to the court's findings of fact and conclusions of law, and in open court gives notice of appeal to our court of civil appeals 2nd supreme judicial district of Texas. And the parties hereto are allowed ten days after adjournment of the court in which to prepare, present, have allowed, approved and filed statement of facts and bills of exceptions.

Appeal Bond. Filed May 4, 1904.

Appeal Bond.

In District Court, Taylor County, Texas, February Term, 1904.

No. 1644.

ABILENE COTTON OIL CO.
vs.
TEXAS & PACIFIC RAILWAY CO.

Whereas, in the above entitled and numbered cause pending in said court the said court at a regular term of said court, on to-wit: April 16th, 1904, *the said court* made and rendered its final judgment in said cause, the said judgment being to the effect that
53 plaintiff Abilene Cotton Oil Co. take nothing by said suit against defendant Texas & Pacific Railway Company and that the defendant Texas & Pacific Railway Company go without day and recover its costs in said cause against said plaintiff Abilene Cotton Oil Co.

From which judgment the said Abilene Cotton Oil Co. has taken an appeal to our court of civil appeals second supreme judicial district of Texas.

Now, therefore, we, Abilene Cotton Oil Co., as principal, and —— —— and —— —— as sureties, acknowledge ourselves bound to pay to Texas & Pacific Railway Company, appellee, the sum of four hundred dollars, conditioned that the said Abilene Cotton Oil Co, appellant, shall prosecute its appeal with effect, and shall pay all the costs which have accrued in the court below and which may accrue in the court of civil appeals and supreme court.

This May 4th, 1904.

ABILENE COTTON OIL CO.,
Per HARDWICKE & HARDWICKE,
Its Agents and Attorneys.
J. G. LOWDEN.
O. W. STEFFENS.

I have fixed the probable amount of costs of this suit in the court below, the court of civil appeals and the supreme court at $200, and approve this bond. This May 4th, 1904.

V. F. WOMACK.
Clerk Dist. Court, Taylor Co., Texas.

Endorsed: Abilene Cotton Oil Co. *vs.* T. & P. Ry. Co. Appeal Bond. Filed May 4th, 1904. V. F. Womack, Clerk District Court, Taylor County, Texas.

54 *Assignments of Error.*

Filed July 22, 1904.

Assignments of Error.

In the District Court, Taylor County, Texas.

ABILENE COTTON OIL CO.
vs.
T. & P. RY. COMPANY.

The Abilene Cotton Oil Co. comes and files the following assignment of errors, to-wit:

First. The court erred in holding that it was without jurisdiction to declare the 67 cent rate illegal, on the ground that the Interstate Commerce Law applied.

Second. The court erred in holding that it had no jurisdiction herein and rendering judgment in favor of defendant, because even if the facts show compliance with the Interstate Commerce Act, (which it not admitted, it being hereafter urged that such compliance is not shown) and even if it should be held that in an action based in terms on the said act the state courts have not jurisdiction by reason of Section 9 of said act, yet plaintiff's petition, being based on the common law liability of defendant, and not being predicated on the Act, and as at the time of the passage of the Act the facts plead by plaintiff were actionable at common law, and as by the express language of said

Act in Section 22 thereof, it is provided "And nothing in this — contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." the jurisdiction of state courts to hear and determine a suit based on the common law liability of defendant was not ousted.

Third. The court erred in its second conclusion to the effect that "The facts so found show that the defendant complied with the Interstate Commerce Law and said rates and classifications were thereby properly established and in force."

55 Fourth. Under the facts found by the court the court erred in rendering judgment for defendant, inasmuch as by reason of the facts found the court should have rendered judgment in favor of plaintiff for the unreasonable charges exacted of plaintiff by defendant, and the court erred in not rendering judgment in behalf of plaintiff for its damages, which said damages in law *was* the difference between the reasonable charges as found by the court and the unreasonable charges as exacted by defendant and collected from plaintiff as found by the court.

Fifth. The court having found what the reasonable rate was and having further found that the rate exacted of plaintiff was unreasonable the court erred in not rendering judgment in behalf of plaintiff for the difference between the reasonable and unreasonable rates as found by the court.

Fifth. The court having found that the rate charged was unreasonable and discriminative and the only inference to be drawn from the testimony being that the rate charged was made excessive for the purpose of keeping plaintiff from buying products in Louisiana the court erred in not rendering judgment for plaintiff for the difference in a reasonable and unreasonable rate as found by the court.

Sixth. The court erred in its third conclusion of law because the facts found by the court do not show compliance with the Interstate Commerce Law.

Seventh. The court erred in not rendering judgment for plaintiff for the amount of the unreasonable charges as found by the court because the facts found by the court fail to show compliance with the Interstate — Law but show that it was not complied with.

Eighth. The court erred in not rendering judgment for plaintiff for the amount of the unreasonable charges as found by

56 the court because defendant was liable therefor under its common law liability.

Ninth. The defendant being a common carrier for hire and the court having found that it exacted unreasonable charges for carriage of goods, and that same were extortionate and discriminative, and the amount of such extortionate unreasonable and discriminative charges having been shown by the evidence and found by the court the court erred in not rendering judgment in behalf of plaintiff for same.

HARDWICKE & HARDWICKE,
Attorneys for Plaintiff Abilene Cotton Oil Co.

Endorsements: Abilene Cotton Oil Co. *vs.* T. & P. Ry. Co. No. 1644. Assignment of Errors. Filed July 22d, 1904. V. F. Womack, Clerk District — Taylor County, Texas.

Certificate of Clerk of District Court.

Clerk's Certificate.

THE STATE OF TEXAS, *County of Taylor:*

I, V. F. Womack, Clerk of the District Court in and for Taylor County, Texas, hereby certify that the foregoing 77 pages contain a true and correct copy of all the proceedings had in cause No. 1644, Abilene Cotton Oil Co. *vs.* Texas & Pacific Railway Company, pending in the District Court of Taylor County, Texas. And I further certify that accompanying this transcript on the page immediately following this page is a true, correct and certified bill of all the costs in said cause accrued up to and including the present time.

In testimony whereof, I hereunto affix my official signature and seal of office at Abilene, Texas, this July 22d, 1904.

[SEAL.] V. F. WOMACK,
Clerk of the District Court of Taylor County, Texas.

57 *Bill of Costs in District Court.*

No. 1644.

ABILENE COTTON OIL CO.
vs.
TEXAS & PACIFIC RY. CO.

Clerk's Fees:

Issuing Writ	$1.50
Docketing cause	.20
Filing papers	6.90
Entering Appearance	.20
Entering Continuance	1.00
Swearing witnesses	.30
Approving Bond	1.50
Issuing precept to serve interrogatories	2.25
Issuing Commission to take deposition	2.25
Copy Interrogatories with Certificate & seal	10.00
Entering final judgment	1.00
Taxing costs	.25
Transcript to Court Civ. App.	39.00
Total Clerk's Fees	$67.00

Sheriff's Fees:

Executing writ and cop-	1.50
Serving notice to take deposition	1.00
Jury Fees	.50
Total Sheriff's Fees	$3.00
Depositions	12.95
Total costs	$82.00

THE STATE OF TEXAS, *County of Taylor:*

I hereby certify the above to be a correct account of the costs in above entitled and numbered suit, up to this date.

Witness my hand and seal of said Court, affixed at office in Abilene, Texas this 22d day of July, 1904.

Attest:

[SEAL.]

V. F. WOMACK,
Clerk District Ct., Taylor Co.

58 Endorsements on transcript filed in the Court of Civil Appeals:

No. 4687.

ABILENE COTTON OIL CO.
vs.
TEXAS & PACIFIC RAILWAY CO.

From the District Court of Taylor County.

Applied for by Hardwicke & Hardwicke Attorney- for Appellant on the 4th. day of May, 1904, and delivered to Hardwicke & Hardwicke on the 23d day of July 1904.

V. F. WOMACK,
Clerk District Court, Taylor County, Texas.

Filed in Court of Civil Appeals, at Fort Worth, Texas, the 26th day of July, 1904.

W. C. STRONG,
Clerk Court of Civil Appeals,
2nd Supreme Judicial District of Texas.

Opinion of Court of Civil Appeals. Filed Feb'y 25, 1905.

No. 4687.

ABILENE COTTON OIL COMPANY, Appellant,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Appellee.

From District Court of Taylor County.

Opinion.

Adopting the construction of the pleadings evidently given them in the briefs, and treating it as presented, this case, briefly stated, is an action by appellant for damages for a violation of an alleged common law right, in that appellee demanded and coercively collected from appellant freight charges in excess of a reasonable compensation for the transportation of a number of car loads of cotton seed from the town of Cotton Port, and other designated towns in the state of Louisiana, to the city of Abilene in the state of Texas. It is averred that the rate actually demanded and received by appellee was 67 cents for each one hundred pounds of cotton seed
59 transported, which rate is alleged to have been unreasonable, unjust and discriminative; that a reasonable charge and compensation for the service performed would have been the sum of the local rates, as established by appellee, from the several towns in Louisiana named in the petition to the town of Alexandria, also in Louisiana, and from said Alexandria to said city of Abilene. The difference between the reasonable and unreasonable charges, as so stated, approximates 30 cents per hundred pounds of the shipments in question, and aggregates the sum of $1951.83, which appellant seeks to recover.

Appellee, in addition to certain exceptions which appear to have been waived by a failure to invoke action of the court thereon pleaded the general denial and specially to the effect that the shipment in question was an interstate one, and that the rate of 67 cents per hundred pounds charged was in accordance with the classification and schedules of rates theretofore duly filed in behalf of appellee with the Interstate Commerce Commission and published and posted as required by the Act of Congress generally known as the Interstate Commerce Act.

A jury was waived and the trial court found as true, among other necessary things not necessary to here notice, the facts as alleged by the respective parties as hereinbefore generally stated, but concluded as a matter of law that the freight rate demanded and received by appellee was the only lawful rate it could have demanded and received because of the fact that it was the rate fixed on the commodity in question, between the named points, in the classification, and lists of freight rates that had theretofore been filed by appellee with the Interstate Commerce Commission and promulgated

as alleged by appellee in its answer. Judgment was accordingly rendered for appellee, and hence this appeal.

60 We have stated the averments and facts very briefly, but we think enough has been stated to render it apparent that a very interesting and important question has been presented. That appellee is a common carrier for hire; that the points named are situated on its line of railway, as alleged; that cotton seed in quantity as alleged was transported as charged; and that a freight rate of 67 cents per hundred pounds was coercively demanded and received by appellee, are facts undisputed. Nor has appellee by any cross assignment attacked the court's findings of fact to the effect that the rate charged was and is inherently unreasonable, unjust, and discriminative to the extent claimed by appellant. So that we are relieved from a consideration of the difficulties discussed in some of the cases in ascertaining the fact and therefore now have squarely before us the questions whether, in a state court, a shipper in cases of interstate carriage can by the principles of the common law be accorded relief from unjust and unreasonable freight rates exacted from him, or shall relief in such cases be denied merely because such unreasonable rate has been filed and promulgated by the carrier under the Interstate Commerce Act?

In undertaking to dispose of the questions presented it may not be inappropriate to premise the statement that an unrestrained right, if any, to impose freight rates by common carriers engaged in interstate commerce would include the right in effect to altogether deny to many citizens of the United States and territories the acquisition and use of many articles of commerce that in the developement of the present age must be held to be necessaries. In some of the states and territories there are comparatively no manufactories

61 In others no mines of coal, or of certain kinds of ore, or useful metals. In yet others an absence of certain agricultural or pastoral products, and the reciprocal exchange of these and other necessaries not only answers the actual necessities of the citizens in all parts of the American Union, but also seems essential to the proper development and power of our great nation. To deny such exchange is to paralize industries in many mining, manufacturing and commercial centers, and to unreasonably retard individual and national life. There seems, therefore, a necessity for some law that may be applied in some court to prevent unreasonableness or prohibitive freight charges by those necessary factors of modern life common carriers.

Pretermitting for the moment the question of the proper court in which it may be applied, we think the common law provides a remedy.

In this state it is declared by express legislative enactment that the common law of England (so far as it is not inconsistent with the constitution and laws of this state) shall, together with such constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature. R. S., Art. 3558.

Mr. Hutchinson, in his work on Carriers, 2 Edition, section 447, in discussing the amount of compensation to be allowed the common

carrier for the transportation of goods in cases where the rate has not been fixed by statute, by established usage, nor by agreement of the parties, says that; "The carrier will be entitled to demand and receive a reasonable compensation." And that; "further than that his charges shall be reasonable, the common law seems to have put no restrictions upon the carrier in respect to his demand for compensation." The Supreme Court of the United States, in Interstate Commerce Commission *v.* N. O. & T. P. Ry. Co., 167 U. S.,
62 502, 42 L. Ed., 254, in speaking of freight charges by common carriers, makes use of the following terms: "For more than a hundred years it has been the affirmative duty of the courts to execute and enforce the common law requirements that all charges shall be reasonable and just." And in the case of Western Union Telegraph Company *v.* Call Publishing Company, 181 U. S., L. Ed. Bk. 45, page 765, the same great court, in speaking of the common law, and in answering the contention that there was no common law that could be applied in the case before the court, say: "Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this can not be so, and that the principles of common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment." See, also, Tift *v.* Southern Railway Company, 123 Fed. Rep., 790. The foregoing citations, it seems to us, authorize the conclusion that the appellee in demanding and receiving the excessive freight rate as found by the court, violated a common law right of the appellant in this case.

There yet remains for determination, however, the right, if any, of a state court to apply the principles of the common law, and the effect of the act of Congress invoked by appellee. In the case of Swift *v.* Philadelphia & — R. R. Co., 58 Fed. Rep., 858, it is held, in an opinion of the circuit court for the northern district of Illinois, by Grosscup, district judge, to the effect, (1) that the common law rule forbidding common carriers from exacting unreasonable charges does not apply to interstate commerce, even when the con-
63 tract of carriage is made in a state where that rule prevails, for the reason that such commerce is governed solely by the law of the United States, and the United States have never adopted the common law, and (2) that the right to question the unreasonableness of an interstate commerce rate is a matter of primary, as well as of exclusive, jurisdiction in the federal courts.

In a later case, however, the case of Murray *v.* Chicago & N. W. Ry. Co., 62 Fed. Rep., 24, the circuit court for the northern district of Iowa, in an opinion by Shiras, judge, differs from the opinion in the Swift case in both particulars. The latter court, in the more recent case of Van Patten *v.* Railway Co., 74 Fed. Rep., 981, holds that the actions for damages brought under the provisions of the interstate commerce act are within the exclusive jurisdiction of the federal courts. Other cases of like tenor might be cited. But in the case of the Western Union Telegraph Company *v.* Call Publish-

ing Company, *supra*, the Supreme court of the United States, not only recognized the common law as providing a remedy against unreasonable rates in interstate commerce cases, but also, in the absence of congressional restriction, the right of a state court to apply the remedy. In that case, as appears from its report, suit was instituted in a state court in the state of Nebraska by the Call Publishing Company for the recovery of unjust and discriminative charges made by the Western Union Telegraph Company for the transmission over its lines of the associated press dispatches. The plaintiff in the suit recovered judgment which was affirmed by the supreme court of Nebraska. On writ of error to the Supreme Court of the United States the contention of the Telegraph Company is thus stated:

"The contention of the telegraph company is substantially
64 that the services which *is* rendered to the publishing company were a matter of interstate commerce; that Congress has sole jurisdiction over such matters, and can alone prescribe rules and regulations therefor; that it had not at the time these services were rendered prescribed any regulations concerning them; that there is no national common law, and that whatever may be the statute or common law of Nebraska is wholly immaterial; and that therefore, there being no controlling statute or common law, the state court erred in holding the telegraph company liable for any discrimination in its charges between the plaintiff and the Journal Company. In the brief of counsel it is said: 'The contention was consistently and continuously made upon the trial by the telegraph company, that as to the state law it could not apply for the reasons already given, and that, in the absence of a statute by Congress declaring a rule as to interstate traffic by the telegraph company, such as was appealed to by the publishing company, there was no law upon the subject.'" These contentions were overruled, notwithstanding the fact that the service of the telegraph company was treated as a subject of interstate commerce, and the judgments of the Nebraska courts affirmed. This case would seem to be undoubtedly authority for maintaining the right of the state courts, in the absence of congressional action, to dispose of the issue of an inherently unreasonable rate under the common law. And this right has not, in our judgment, been taken away by the Interstate Commerce Act applying to the carriers therein specified. It is true that the act, (U. S. Compiled Statutes, Vol. 3, page 3154), in its first and second sections declares that all charges for any service rendered or to be rendered by carriers subject to the provisions of the act in the transportation of passengers or property shall be reasonable and
65 just, and that unjust and unreasonable charges for such services, and discriminations between persons and places are unlawful. In the eighth section, any person injured in consequence of a violation of any one or more of the provisions of the act is given the right to recover the damages sustained "together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery," and in the ninth section, jurisdiction is given the district and circuit courts of the United States of competent jurisdiction to try suits for the recovery of the damages and attorney's fee pro-

vided for in the eighth section. But in the twenty-second section of the act we find this language; "* * * and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." It is difficult to imagine terms more clearly evincing the purpose of Congress to leave the people of the United States in the full and undisturbed possession of all remedies theretofore existing for injuries such as are involved in this case. The term "remedies," as here used, ought not, we think, be used in any restricted sense. The Standard Dictionary defines remedy as, among other things, "A legal mode for enforcing a right or redressing or preventing a wrong." Anderson's Dictionary of law, defines the term as; "A mode prescribed by law to enforce a duty or redress a wrong." These definitions seem certainly broad enough to include the necessary courts or tribunals. How can there be a remedy for a wrong without a tribunal having power to determine the fact and accord and enforce relief? It may well be held, as was properly done in some or all of the cases cited, that a recovery for the invasion of a right created by the act, and not theretofore existing, or for the recovery of the "damages and attorney's
66 fee" provided for in the act, that resort must be had to the particular federal tribunals herein specified. But that is not the cause. Appellant alleges facts showing a common law right of action,—one existing at the time and prior to the passage of the Interstate Commerce Act,—and makes no prayer for "damages and attorney's fee." On the contrary, as we construe this case, it is one where a common carrier, in violation of the common law, has charged and collected from a shipper a freight rate inherently exorbitant and unreasonable. So treated, we think the court below had the power to try this suit.

As opposed to this view appellee cites, together with others that we think easily distinguishable, the cases of Gulf, Colorado & Santa Fe Railway Company *v.* Moore, 83 S. W. Rep., 362 and Van Patten *v.* Railway Co., 81 Fed. Rep. 545. If by proper construction the Van Patten case is adverse to our conclusions, we are not inclined to follow it, and we think it clear that the case cited from our own supreme court is not in point. In the case of Railway Company *v.* Moore, damages were sought by an interstate passenger because of a refusal of the railway company to stop one of its trains at a station in Texas, for which his ticket called. The facts showed that the train was a through one, which in accord with the rules of the railway company theretofore prescribed, did not stop at the station named, and a sufficient number of later trains for the traveling public were operated and regularly stopped thereat. Such reasonable regulations are not forbidden by the common law, but on the contrary, have often been upheld by the courts. Railway Company *v.* People of Illinois, 177 U. S., 514, L. Ed. Bk. 44, 868. It seems evident therefore from the facts stated that the judgment in the passenger's favor could only be upheld by an application of the rule against
67 discrimination provided in the Interstate Commerce Act, which the court held was enforceable alone by the federal

courts, but was careful to say: "From what has been said, it is apparent that plaintiff's recovery, as had in the trial court, is founded on a supposed violation of the 'Interstate Commerce Act,' and not upon the common law or any other law of this state, and the case necessarily involves the question, whether or not the statute gives such a remedy as this for its violation." 11 Texas Court Reporter, 425. It is also worthy of notice that the case was reversed rather than dismissed on the ground that "there were allegations and proof tending to show a cause of action upon a different theory, viz; that when the ticket was purchased by plaintiff (in the Indian Territory) there was an express agreement between him and the defendant's agent that he might travel" on the train upon which he took passage, and stop at the station named.

We will add in concluding, that while the act of Congress neither provides within itself any schedules of rates for the transportation of interstate commerce, if indeed it could have been done so, nor gives the commission created by the act such power, it is nevertheless remedial in character, entitled to a liberal construction in the interest of the multitudes of shippers in the country, and we feel unwilling to construe the act as evincing a purpose on the part of Congress to in any manner or degree impair or abridge either the right or the remedies, inadequate though they may be, theretofore existing, one of which undoubtedly was in a proper court to redress the wrong of an unjust exaction. We think a contrary purpose is most plainly expressed in the quotation made from the twenty-second section.

68 It must follow that upon the facts found the judgment should have been for appellant. We therefore adopt the trial court's findings of fact and, applying thereto the principles of law we have adduced, reverse the judgment and here render judgment in appellant's favor for the said sum of $1951.83, excessive freight charges, together with interest thereon at the legal rate from the date of its payment to appellee, to wit, October 7, 1901, and all costs of suit.

Reversed and rendered.

CONNER,
Chief Justice.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, Feb. 25, 1905.

W. C. STRONG, *Clerk.*

Judgment of Court of Civil Appeals.

4687.

ABILENE COTTON OIL CO.
vs.
TEXAS & PACIFIC RY. CO.

From District Court of Taylor Co., February 25, 1905.

Opinion by Mr. Conner, Ch. J.

This cause came on to be heard on the transcript of the record, and the same being inspected because it is the opinion of the court that there was error in the judgment; and it is ordered that such judgment be here rendered in favor of the appellant as should have been rendered in the trial court. It is accordingly ordered, adjudged and decreed by the court that the Appellant, Abilene Cotton Oil Company, do have and recover of and from the appellee, The Texas & Pacific Railway Company, the sum of $1951.83, with 6% interest thereon from October 7th, 1901, together with all costs in this behalf expended, and that this decision be certified below for observance.

69 *Appellee's Motion for a Rehearing.*

In the Court of Civil Appeals, Second Supreme Judicial District of Texas.

No. 4687.

THE ABILENE COTTON OIL COMPANY, Appellant,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Appellee.

Now comes the appellee, the Texas & Pacific Ry. Co., and moves the court to set aside the judgment reversing and rendering this cause filed on the 25th of February, 1905, and grant it a rehearing and affirm this cause for the following reasons to wit:

First: The court of civil appeals erred in holding that the trial court had jurisdiction over the matter of this suit and that it had power to grant the relief sought by the plaintiff it appearing that the rate charged was the rate fixed in compliance with the Interstate Commerce Act and that appellant had plead the provisions of said Act.

Proposition.

The proof having shown that the rate charged was the rate fixed in compliance with the Interstate Commerce Act the trial court did not have jurisdiction over the alleged cause of action.

Second: The court of Civil appeals erred in holding that the trial court had power to declare the rate charged unreasonable it appearing that the rate was the rate fixed in compliance with the Interstate Commerce Act.

First Proposition.

The Interstate Commerce Act having provided that injured parties should make complaint to the Interstate Commerce Commission or file suit in the United States District or Circuit Courts no other tribunal would have power to declare rates unreasonable.

Second Proposition.

The United States Congress having provided how rates
70 shall be fixed in Interstate shipments and having provided remedies for injured parties the effect is to take from all state courts power to interfere with the provision of the Act.

Third Proposition.

The appellee having shown it charged the rate fixed in accordance with the Interstate Commerce Act and having plead the provision of the Act the effect of the holding of the Court of Civil Appeals is to nullify the Act of Congress.

Remarks.

There are but two propositions to be decided by the court, the one is, did the court have jurisdiction over the alleged cause of action and the other is did the court have power to declare the rates charged unreasonable. The appellee insists that the court did not have either jurisdiction or the power to declare the rates charged unreasonable. The United States Congress has provided how rates should be fixed by common carriers and whenever the United States Congress legislates on a subject of Interstate Commerce it takes from all State Courts the power to interfere with the provision of law so passed. It was not the intention of Congress to provide a method of fixing rates and at the same time leave the power to courts foreign to Federal Courts to declare the rates unreasonable and in effect to nullify the Act. The provision in Sec. 22, of the Act with reference to the rights and remedies existing at common law or by the statute shall remain the same could have no reference to State statutes or the administration of common law in State Courts. The intention of the reservation in Sec. 22, was to give to injured parties any rights that existed at common law and which could be inforced in the United States Courts and the rights which they had
71 under any United States Statute. The United States Congress certainly did not intend by this reservation to permit

any state court to declare the rates so charged unreasonable and while all rights and remedies existing under the common law may have been reserved to injured parties the Statutes of the United States specially provided that these rights and remedies should be sought in the United States Circuit or District Courts. The right to go into a state court is not a common law right and does not exist at common law, and it is only by force of a state statute that any remedies for wrongs can be corrected in a state court. There is no common law right to go into a state court but the right exists only by statute. The United States Congress evidently intended that the principles of the common law should be applied in correcting any abuses of common carriers but by fixing the U. S. and Circuit and District Courts as the Courts in which these rights should be administered it took from all other courts the power to entertain a suit arising under the Statutes on Interstate Commerce or a suit arising by reason of any rate fixed under the Interstate Commerce Act.

For the reasons given above appellee requests the court to grant it a rehearing and affirm this cause.

T. J. FREEMAN,
J. M. WAGSTAFF,
Att'ys for Appellee, T. & P. Ry. Co.

Filed in the Court of Civil Appeals for Second Supreme Judicial District of Texas March 9, 1905.

W. C. STRONG, *Clerk.*

72 *Order of the Court of Civil Appeals Overruling Appellee's Motion for Rehearing.*

4477, 4687.

ABILENE COTTON OIL CO.
vs.
TEXAS & PACIFIC RY. CO.

MARCH 18, 1905.

This day came on to be heard the Motion by the appellee for rehearing in this cause, and the same having been duly considered by the court, is overruled.

Application for a Writ of Error to the Supreme Court of Texas.

In the Supreme Court of the State of Texas.

THE TEXAS & PACIFIC RY. CO., Plaintiff in Error,
vs.
THE ABILENE COTTON OIL COMPANY, Defendant in Error.

From the District Court of Taylor County, Texas.

To the Honorable Supreme Court of the State of Texas:

Your petitioner, The Texas & Pacific Ry. Co., respectfully represents that this cause was instituted in the District Court of Taylor County, Texas, by defendant in error, on the 14th of October, 1901, for the recovery of $1951.00 over charges on cotton seed shipped from points in Louisiana, to Abilene, Texas, which cause was tried in the District Court of said County on the 16th of April, 1904, resulting in a judgment in favor of plaintiff in error which said cause was reversed and rendered by the court of civil appeals of the Second Supreme Judicial District of Texas at Ft. Worth, Texas, on the 25th of February, 1905. Petitioner further represents that its motion for rehearing raising the several matters hereinafter set out was duly overruled by said Court of Civil Appeals on the 18th of March, 1905.

Your petitioner now applies to the Supreme Court for a Writ of Error to the end that said Court may review the said cause and the action of said Court of Civil Appeals therein and correct such
73 action and as reasons and ground for the granting of such Writ of Error, your petitioner assigns the following errors committed by the Court of Civil Appeals in reversing and rendering said judgment and in refusing to grant the motion for rehearing to wit:

First assignment of error.—The Court of Civil Appeals erred in holding that the trial court had jurisdiction over the subject matter of this suit and that it had power to grant relief sought by the plaintiff in error it appearing that the rate charged was fixed in compliance with the interstate Commerce Act and that the plaintiff in error had plead the provision of said Act.

Proposition.

The proof having shown that the rate charged was the rate fixed in compliance with the Interstate Commerce Act the trial court did not have jurisdiction over the alleged cause of action.

Statement.

The cause was tried before the District Judge without a jury and the court filed conclusions of law and fact and the trial court found as a matter of fact that the rate charged the defendant in error was

the rate fixed in compliance with the Interstate Commerce Act. (Tr. pp. 68 and 69 beginning with line 30 on page 68 including entire page 69, and the first five lines on page 70 including the 7th, 8th, 9th and 10th findings of the trial court). The court of civil appeals in the written opinion filed in this cause also affirmatively finds as a fact the rate charged the defendant in error by plaintiff in error was the interstate rate from points in Louisiana to Abilene, Texas, and that the rate was in force at the time that the alleged unreasonable charge was made.

74 *Second Assignment of Error.*

The Court of Civil Appeals Erred in holding that the trial court had power to declare the rate charged unreasonable it appearing that the rate was the rate fixed in compliance with the Interstate Commerce Act.

First Proposition.

The Interstate Commerce Act having provided that injured parties should make complaint to the Interstate Commerce Commission or file suit in the United States District or Circuit Courts no other tribunal would have power to declare rates unreasonable.

Second Proposition.

The United States Congress having provided how rates shall be fixed in Interstate shipments and having provided remedies for injured parties the effect is to take from all state courts power to interfere with the provision of the Act.

Third Proposition.

The Plaintiff in error having shown it charged the rate fixed in in accordance with the Interstate Commerce Act and having plead the provision of the act the effect of the holding of the Court of Civil Appeals is to nullify the Act of Congress.

Statement.

The Statement under the first assignment of error in this petition applies to this assignment of error and the court is required to consider it in connection therewith. It further appears from the opinion of the Court of Civil Appeals filed in this case that the plaintiff in error charged the defendant in error a rate which had been established in accordance with the Interstate Commerce Act. This fact is affirmatively found by the Court of Civil Appeals.

75 *Authorities Under Both Assignments.*

G. C. & S. F. *vs.* Moore, 83 S. W., 362. Dillingham *v.* Fisch, 21 S. W., 554. Ry. *vs.* Lumber Co., 21 S. W., 290. Ry. *vs.* Stoner, 23 S. W., 1020. Ry. *vs.* Dunmit, 42 S. W., 583. Ry. *v.* Hefley, 158 U. S., 98. Van Patten *vs.* Ry. 81 Fed., 545; 62 Fed. Rep., 24; 105 Fed. Rep., 785.

Remarks.

The vital question in this case is whether or not the District Court of Taylor County, Texas, had jurisdiction over the alleged cause of action and did said court have the power to declare the rates which the plaintiff in error charged for transporting the cotton seed from points in Louisiana to Abilene, Texas, unreasonable. The United States Congress has privided how rates should be fixed by common carriers and whenever the United States Congress legislates on the subject of Interstate Commerce it takes from all state courts the power to interfere with the provision of a law so passed. The fact can not be disputed that the United States Congress has undertaken to prescribe how Interstate rates may be fixed by common carriers. The plaintiff in error in accordance with the Interstate Commerce Act fixed the rates which were charged in this case and there is no dispute as to this fact. It certainly was not the intention of Congress to provide a method of fixing rates and at the same time leave the power to foreign courts to declare the rates so fixed unreasonable and in effect to completely nullify the Act. The provision in section 22 of the Act with reference to the rights and remedies existing at common law or by statute could have no reference to state statutes or the administration of common law in the state courts. If in a case of this kind the injured party has a right at common law to bring a suit he would only have the right to bring that suit in
76 the courts of the United States as provided in the Interstate Commerce Act. The United States Congress certainly did not intend by this reservation to permit any state court to declare the rate so charged unreasonable and thereby completely nullify the Act. The Interstate Commerce Act provides a penalty in case the carrier should charge any other rate *other* than the rate fixed in accordance with the provisions of the Interstate Commerce Aact and if the State courts have power to declare the rate charged unreasonable then the act could be completely nullified by the action of foreign courts. There is no common law right to go into a state court but the right to go into a court exists only by statute and the United States Congress evidently intended that the principles of the common law should be applied in correcting any abuses of common carriers but did not intend that the remedies should be administered in any courts other than the courts provided in the Act itself.

The Court of Civil Appeals seems to base its decision adverse to the plaintiff in error largely on the case of Telegraph Company *vs.* Call Publishing Company. The Plaintiff in error contends that the case of Telegraph Company *vs.* Call Publishing Company has no ap-

plication to a case of this kind. While the subject matter of the litigation in the above case was Interstate Commerce and the court held that the principles of the common law were applicable in that case *that* facts in that case are not similar to the facts in this case. In the case now under consideration the Congress of United States has prescribed how the rates should be fixed and promulgated and in obedience to the Act of Congress the rates were fixed by the plaintiff in error. In the Call case there had been no affirmative action of Congress regulating the Telegraph Company and the fixing of
77 rates by the Telegraph Company, and hence that case has no application whatever to the facts of this case. The Court of Civil Appeals seems to make the distinction that this cause of action was not brought under the Interstate Commerce Act but was brought on the common law obligation of the plaintiff and for that reason the Interstate Commerce Act would not apply in this case. If the cause of action was not brought on the Interstate Commerce Act it would make no difference for the reason that the plaintiff in error especially plead the Interstate Commerce Act and by the proper pleading and proper proof brought this case strictly within the terms of the Interstate Commerce Act and plaintiff in error can see no good reason why the same rules would not apply when it pleads the benefit of the Act.

Petitioner therefore respectfully prays that the Writ of Error herein applied for be granted.

T. J. FREEMAN,
J. M. WAGSTAFF,
Att'ys for Plaintiff in Error.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, April 15, 1905.

W. C. STRONG, *Clerk.*

Filed in Supreme Court April 20, 1905.

F. T. CONNERLY, *Clerk,*
By J. S. MYRICK, *Deputy.*

Order of the Supreme Crt of Texas Refusing Application for Writ of Error.

In Supreme Court of Texas, 2nd District.

TEXAS & PACIFIC RY. CO.
vs.
ABILENE COTTON OIL CO.

MAY 8TH, 1905.

This day came on to be heard the application of Texas & Pac. Ry. Co. for a writ of error to the Court of Civil Appeals for the Second District, and the same having been duly considered, it is
78 ordered that said application be refused; that the applicant Texas and Pacific Railway Company pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above-styled cause.

Witness my hand and the seal of said Court, this the 24th day of May, A. D. 1905.

[SEAL.] F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

Filed in Court of Civil Appeals, Second Supreme Judicial District of Texas, May 29, 1905.

W. C. STRONG, *Clerk*.

Bill of Costs in the Supreme Court of Texas.

Bill of Costs in Supreme Court.

Filing Application	.50
Docketing Petition	.50
Entering Appearance of Counsel	.50
Filing two briefs	.60
Filing three papers	.90
Entering Orders	.50
Entering judgment on Application	1.00
Certified copy of Judgment	1.00
Taxing costs of Application	.50
Certified copy bill of costs	1.00
Total	$7.00

I, F. T. Connerly, Clerk of the Supreme Court of Texas hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and the seal of said Court, at Austin Texas this the 24th day of May 1905.

[SEAL.] F. T. CONNERLY, *Clerk*.

79 *Petition for Writ of Error to United States Supreme Court.*

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABILENE COTTON OIL COMPANY, Defendant in Error.

To the Honorable T. H. Conner:

Your petitioner, the Texas & Pacific Railway Company, a corporation, respectfully shows that heretofore to-wit; on the 16th day of April, 1904, there was tried in the district court of Taylor County,

Texas, a case in which the Abilene Cotton Oil Company was plaintiff and your petitioner was defendant, said suit being styled No. — Abilene Cotton Oil Company *vs.* Texas & Pacific Railway Company.

The declaration of the said Abilene Cotton Oil Company, plaintiff in said cause, was a petition for the recovery of damages against the Texas & Pacific Railway Company wherein the Abilene Cotton Oil Company alleged substantially that in September and October, 1901, the said plaintiff shipped various lots of cotton seed from Cotton Port, Mansura, Moreland, Moreauville, Evergreen, Longbridge, and Lecompte, in the state of Louisiana, to the town of Abilene, Texas, all of which stations were on the line of the said Texas & Pacific Railway Company.

It was alleged that the said Texas & Pacific Railway Company charged and collected for said shipments, as freight, the sum of 67¢ per hundred pounds which was alleged to be an unreasonable, unjust and extortionate charge and that the reasonable rate would have been the sum of 20¢ from Alexandria to Abilene, and the various local rates from the stations to Alexandria setting out said local rates; that if the sum of the local rates had been charged
80 the freight properly to have been collected and received would have amounted to the sum of $1507.00, whereas it was charged that the rate of 67¢ per hundred pounds amounted to $3458.83, making an overcharge of $1951.83, for which a judgment was sought with interest thereon.

The defendant answered by a general denial, special exceptions, and also specially plead that the shipments set forth and involved were interstate shipments, and that it acted by and under the provisions of what was known as the interstate Commerce Act, in that it had complied with all of its provisions by promulgating, publishing, and regularly filing its regular interstate tariff rate on all shipments between the points named, and that said regular published tariff rate was the amount it actually charged and received, and that it was not authorized to collect or receive any greater or less sum, and that it had full power and authority to collect said amount, and the plaintiff was not entitled to recover in the district court of Taylor County, Texas, by reason of said charge so made.

Upon a trial of said cause in said district court a judgment was rendered in favor of the plaintiff in error, and thereupon the case was regularly appealed to the Court of Civil Appeals for the Second Supreme Judicial District, at Fort Worth, Texas, which said court on February 25, 1905 after having heard said cause, rendered a judgment and decree adopting the conclusions of fact found by the trial court, reversed the judgment of said trial court and rendered a judgment against this plaintiff in error for the amount sued for, with interest thereon.

Your petitioner filed its motion for rehearing, which, March 18, 1905, was overruled. It thereupon, under and by virtue of the laws of Texas, filed its petition for writ of error with the Supreme Court of Texas, asking for a rehearing, and that the judgment of
81 the Court of Civil Appeals be reversed, and that the judgment of the District Court of Taylor County, as originally

rendered, be affirmed. The said Supreme Court of Texas having considered said petition for writ of error refused to allow the same, and on the — day of ——, 1905, entered its order refusing to allow said petition for writ of error, whereupon the judgment of the said Court of Appeals became final.

Your petitioner shows that upon the trial of said cause in the District Court of Taylor County, Texas, and in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, and in its application for writ of error to the Supreme Court of Texas there were presented to said courts certain federal questions, to-wit:

I.

That the District Court of Taylor County, Texas, had no jurisdiction to hear and determine any controversy or claim made by the plaintiff below, wherein it sought to recover for the amount collected on an interstate shipment less than that charged according to the regular published tariff rates.

II.

That said shipment being an interstate shipment and it being made to appear that the Texas & Pacific Railway Company had complied with the terms and provisions of the act of Congress of February 4, 1887, entitled and Act to Regulate Commerce, and known as the Interstate Commerce Act, with reference to the making, filing and publication of its tariff rates as applied to the shipment involved in this suit, and that the regular published tariff rates in force and in effect between the points described in said suit were the sum of 67¢ per hundred pounds, and therefore the said Texas & Pacific
82 Railway Company was entitled to charge and receive said amount, and any judgment or ruling to the contrary was repugnant to, in conflict with, in violation of, and in contravention with the statutes of the United States with reference to the regulation of interstate commerce and the provisions therein claimed.

III.

That this petitioner set up as a defense to the cause of action presented in the suit below, the want of authority or power on the part of the District Court of Taylor County, Texas, or the Court of Civil Appeals upon appeal to set aside the freight rate established upon an interstate shipment which had been regularly published and filed with the Interstate Commission, and render a judgment for damages because of the charging and collecting such regular published tariff rates.

IV.

That the interpretation placed on the Interstate Commerce Act by the said Court of Civil Appeals for the Second Supreme Judicial District of Texas was contrary to in violation of, and in contravention with the statutes of the United States, as to the regulation of interstate commerce.

The petitioner further shows that the said judgment of the said Court of Civil Appeals for the Second Supreme Judicial District of Texas was and is a final judgment in the highest court in the State of Texas in which a decision in said suit could or can be had.

The petitioner further shows that a federal question was made in said case, to-wit: as hereinbefore set out, and that the said judgment of the said Court of Civil Appeals for the Second Supreme Judicial District of Texas was repugnant to and in conflict with the laws of the United States and the Interstate Commerce Acts of its
83 Congress aforesaid, and especially sections 8 and 9 of the act entitled An Act to Regulate Commerce, approved February 4, 1887, that petitioner claimed a title, right, privilege and immunity under and by virtue of said acts aforesaid, and there was drawn into question the construction and application of said Acts, and the decision of the Court of Civil Appeals for the Second Supreme Judicial District of Texas was against the said title, right, privilege and immunity claimed thereunder; and that a decision of said federal question was necessary to the judgment rendered.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and prays that a writ of error to said Court of Civil Appeals for the Second Supreme Judicial District of Texas be allowed: that citation be granted and signed: that the bond herewith presented be approved, and that upon a compliance with the terms of the statute in such cases made and provided, said bond and writ of error may operate as a supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment aforesaid of the Court of Civil appeals for the Second Supreme Judicial District of Texas be reversed.

T. J. FREEMAN,
H. C. SHROPSHIRE,
Attorneys for the T. & P. Ry. Co., Plaintiff in Error.

The writ of error as prayed for in the foregoing petition, is hereby allowed, this the 14 day of June, 1905; the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Five Thousand dollars, dated at Fort Worth, Texas, this the 14 day of June, A. D. 1905.

84 T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

It is hereby certified that a copy of this writ of error is this day lodged in the Clerk's office for the use of the defendant in error, this the 14 day of June, 1905.

[SEAL.] W. C. STRONG,
Clerk Court of Civil Appeals.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, June 14, 1905. W. C. Strong, Clerk.

Writ of Error to U. S. Supreme C'rt.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABILENE COTTON OIL COMPANY, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals for the Second Supreme Judicial District of Texas, before you, or some of you, being the highest court of law or equity of the state in which a decision could be had in the said suit between the Abilene Cotton Oil Company, a corporation, and the Texas & Pacific Railway Company, a corporation, wherein was drawn into question the construction of a clause of a statute of the United States, and the
85 decision was against the title, right, privilege or exemption specially set up or claimed under the clause of said statute, and manifest error hath happened to the great damage of the said Texas & Pacific Railway Company, as by its complaint appears; we being willing that error, if any hath been, could be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 13th day of July, 1905, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14th day of June, in the year of our Lord, 1905.

[SEAL.] J. H. FINKS, *Clerk,*
By J. B. FINKS,
Deputy Clerk United States Circuit Court for the Northern District of Texas.

Allowed by
T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, June 14, 1905.

W. C. STRONG, *Clerk.*

86 *Bond on Writ of Error to U. S. Supreme Court.*

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABILENE COTTON OIL COMPANY, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents: That we, the Texas & Pacific Railway Company, a corporation, as principal, and Edw. O. Tenison and C. R. Buddy, as sureties, are held and firmly bound unto the Abilene Cotton Oil Company, a corporation, in the sum of Five Thousand dollars, to be paid to the said obligees, their successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents, yet upon these conditions: that,

Whereas, the above named plaintiff in error, the Texas & Pacific Railway Company, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Civil Appeals for the Second Supreme Judicial District of Texas,

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error, the Texas & Pacific Railway Company, shall prosecute its said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise of full force and effect.

Witness our hands and seal, this the 5 day of June, A. D., 1905.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By T. J. FREEMAN, *Gen. Att'y.*
87 EDW. O. TENISON.
C. R. BUDDY.

I hereby approve the foregoing bond and sureties, this the 14th day of June, A. D., 1905.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas June 14, 1905.

W. C. STRONG, *Clerk.*

Citation in Error.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABILENE COTTON OIL COMPANY, Defendant in Error.

United States of America to Abilene Cotton Oil Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, wherein the Texas & Pacific Railway Company, a corporation, is plaintiff in error and you are defendant in error, and show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable T. H. Conner, Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas,
88 this the 14th day of June, in the year of our Lord, One Thousand, Nine Hundred and Five.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

June 28th, 1905.—I hereby acknowledge service of this citation in error, and receipt of copy of same.

(Signed) ABILENE COTTON OIL COMPANY,
By S. P. HARDWICKE, *Attorney.*

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, June 14, 1905.

Assignments of Error.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABILENE COTTON OIL COMPANY, Defendant in Error.

Now comes the Texas & Pacific Railway Company, Plaintiff in error, and respectfully submits that in the record proceedings, decision, and final judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, for the State of Texas, in the above entitled matter there is manifest error in this, to-wit:

I.

The allegations in the petition filed in the District Court of Taylor County, Texas, by defendant in error, the Abilene Cotton Oil Company, and the testimony offered on the trial of said case showed that the shipment of cotton seed was made over the line of the Texas & Pacific Railway Company from certain points in the State of Louisiana to a point in the State of Texas, and that same was an interstate shipment and it therefore followed that any suit to recover damages on account of any excessive, unreasonable or unjust
89 freight charge made and collected by the Texas & Pacific Railway Company for the transportation of said shipment was wholly within the jurisdiction of a district or sirsuit court of the United States; and that the district court of Taylor county, Texas, had no jurisdiction to hear and determine said cause.

II.

The said Court of Civil Appeals erred in reversing the judgment of the district court of Taylor county and rendering a judgment against the plaintiff in error, for the reason that there was a want of power in the district court of Taylor county to assume jurisdiction over the subject matter of this suit, and the Congress of the United States had prescribed the method of procedure, and no court save a district or circuit court of the United States had the jurisdiction to hear and determine the matters involved.

III.

The said Court of Civil Appeals erred in adopting the conclusions of fact found by the trial court, and in rendering a judgment against this plaintiff in error, which action was erroneous, in that said trial court held that the freight charges collected and received were unreasonable and excessive, when in fact there was no evidence to sustain such finding and judgment of the court.

IV.

The trial court held that the Texas & Pacific Railway Company had complied with the terms and provisions of the act of Congress of February 4, 1887, entitled An Act to Regulate Commerce, and known as the Interstate Commerce Act, with reference to the making, filing and publication of its tariff rates as applied to the shipment involved in this suit; and further held as a conclusion of law
90 that the Texas & Pacific Railway Company was entitled to collect and receive the amount shown by this tariff rate, to-wit: 67¢ per hundred pounds.

It says that the said Court of Civil Appeals erred in not sustaining the holding of the said trial court in this respect, and in rendering a judgment against this plaintiff in error based upon a freight rate lower than that fixed by the said published tariff rate.

V.

It says the judgment of the district court of Taylor County was correct, and the Court of Civil Appeals erred in reversing said judgment and in rendering a judgment against this plaintiff in error, for the reason that it appeared that the shipment involved was an interstate shipment, and that the Texas & Pacific Railway Company had fully complied with the acts of Congress and all the provisions of the Act approved February 4, 1887, entitled An Act to Regulate Commerce, and that under and by virtue of the provisions of the said act and the tariff rates which had been regularly promulgated it was entitled to receive and collect the amount it did, to-wit: 67¢ per hundred pounds, and neither the district court of Taylor County, Texas, nor the said Court of Civil Appeals upon appeal had any power to hold that said rate was unreasonable or unjust, or to fix and determine what was a reasonable and just rate and render a judgment for the difference.

VI.

It says that the judgment of the said Court of Civil Appeals is repugnant and in conflict with the laws of the United States, and especially with those several acts of the Congress of the United States commonly known as an act to regulate commerce, approved February 4, 1887, and acts amendatory thereto, especially sec-
91 tions 8 and 9 of said act, approved February 4, 1887.

VII.

The said Court of Civil Appeals erred in reversing the judgment of the district court of Taylor County, and in rendering a judgment against this plaintiff in error, because said judgment of the said Court of Civil Appeals is repugnant to, and in conflict with, and is contrary, in violation of, and in contravention with the statutes of the United States with reference to the regulation of interstate commerce and provisions therein claimed.

VIII.

The said Court of Civil Appeals erred in rendering any judgment herein against plaintiff in error, because there was drawn in question the construction and application of the statute of the United States, under which plaintiff in error claimed a right, title, privilege and immunity, and the decision of the said Court of Civil Appeals was against the right, title, privilege and immunity thus set up and claimed by plaintiff in error.

IX

The said Court of Civil Appeals erred in holding that although the regular published tariff rate under the terms and provisions of the interstate commerce act was 67¢ per hundred pounds, and which amount the said plaintiff in error collected, yet that said court as

well as the district court of Taylor County had the jurisdiction and power to set aside said regular published tariff rate and to hold that same was unreasonable and unjust, and to hear and determine what was a reasonable and just rate to be charged, and to render a judgment for any unreasonable and excessive amount charged and collected.

X

92 The interpretation placed on the interstate commerce act by the said Court of Civil Appeals for the Second Supreme Judicial District of Texas is contrary to, in violation of, and in contravention with the statutes of the United States as to the regulation of interstate commerce.

T. J. FREEMAN,
H. C. SHROPSHI-E,
Attorneys for the T. & P. Ry. Co.,
Plaintiff in Error.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, June 14, 1905.

W. C. STRONG, *Clerk.*

Bill of Costs in Court of Civil Appeals, Second Supreme Judicial Dist. of Texas.

No. 4687.

ABILENE COTTON OIL CO.
vs.
TEXAS & PACIFIC RY. CO.

Bill of Costs in the Court of Civil Appeals.

Filing Record	.50
Docketing cause	.50
Appearances	1.00
Filing and entering motion	.35
Orsers	2.00
Filing papers	3.20
Judgment	1.00
Taxing costs	.50
Certificate with seal	.50
Mandate	.50
Recording opinion	4.80
Certified copy of bill of costs	.70
Issuing notices	4.50
Transcript of orders	1.00
Making transcript for U. S. Supreme Court	42.30
Total	$63.35

I, W. C. Strong, Clerk of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, do hereby certify that the above statement of the costs incurred in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, in the case of Abilene Cotton Oil Company, Appellant, *vs.* The Texas & Pacific Railway Company, Appellee, is true and correct.

Witness my hand and the seal of said Court at Fort Worth, Texas, this the 4th day of July, 1905.

[Seal Court of Civil Appeals of the State of Texas.]

W. C. STRONG, *Clerk.*

93 In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABILENE COTTON OIL COMPANY, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals for the Second Supreme Judicial District of Texas, before you, or some of you, being the highest court of law or equity of the state in which a decision could be had in the said suit between the Abilene Cotton Oil Company, a corporation, and the Texas & Pacific Railway Company, a corporation, wherein was drawn into question the construction of a clause of a statute of the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under the clause of said statute, and manifest error hath happened to the great damage of the said Texas & Pacific Railway Company, as by its complaint appears; we being willing that error, if any hath been, could be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 13th day of July, 1905, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

94

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 14 day of June, in the year of our Lord, 1905.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas.]

J. H. FINKS, *Clerk,*
By J. B. FINKS,
Deputy Clerk United States Circuit Court
for the Northern District of Texas.

Allowed by
T. H. CONNER,
Chief Justice of the Court of Civil Appeals for
the Second Supreme Judicial District of Texas.

It is hereby certified that a copy of this writ of error is this day lodged in the Clerk's office for the use of the defendant in error, this the 14th day of June, 1905.

W. C. STRONG,
Clerk Court of Civil Appeals.

Filed in Court of Civil Appeals for the Second Supreme Judicial District of Texas, June 14th, 1905.

W. C. STRONG, *Clerk.*

94½ [Endorsed:] In the Court of Civil Appeals for the Second Supreme Judicial District of Texas. Texas & Pacific Railway Company (Plaintiff in Error), *vs.* Abilene Cotton Oil Company (Defendant in Error). Writ of Error. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, June 14, 1905. W. C. Strong, Clerk.

95 In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABILENE COTTON OIL COMPANY, Defendant in Error.

Citation in Error.

United States of America to Abilene Cotton Oil Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, wherein the Texas & Pacific Railway Company, a corporation, is plaintiff in error and you are defendants in error, and show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable T. H. Conner, Justice of the Court of

Civil Appeals for the Second Supreme Judicial District of Texas, this the 14th day of June, in the year of our Lord, One Thousand Nine Hundred and Five.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

June 28th, 1905.

I hereby acknowledge service of this citation in error and receipt of copy of same.

(Signed) ABILENE COTTON OIL COMPANY,
By S. P. HARDWICKE, *Attorney.*

95½ [Endorsed:] In the Court of Civil Appeals for the Second Supreme Judicial District of Texas. Texas & Pacific Railway Company (Plaintiff in Error) *vs.* Abilene Cotton Oil Company (Defendant in Error). Citation in Error. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, Jun- 14, 1905. W. C. Strong, Clerk.

96 I, W. C. Strong, Clerk of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, do hereby certify that the above and foregoing 95 pages contain a true and correct transcript and copy of the record, assignment of errors, and all other proceedings in cause No. 4687, wherein the Abilene Cotton Oil Company is Appellant and the Texas & Pacific Railway Company is Appellee, as fully as the same remain on file and of record in my office at Fort Worth, Texas, except that the original Writ of Error and Citation in Error are herewith transmitted with this transcript. And I further certify that the said transcript was made up under the stipulations and directions of the parties thereto.

Witness my hand and the seal of the said Court of Civil Appeals for the Second Supreme Judicial District of Texas, at my office in Fort Worth, Texas, this the 4th day of July, 1905.

[Seal Court of Civil Appeals of the State of Texas.]

W. C. STRONG, *Clerk.*

Endorsed on cover: File No. 19,844. Texas court of civil appeals, 2d supreme judicial district. Term No. 78. The Texas & Pacific Railway Company, plaintiff in error, *vs.* The Abilene Cotton Oil Company. Filed July 13th, 1905. File No. 19,844.

FILE COPY.

Office Supreme Court, U. S.
FILED.
OCT 29 1906
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1906.

NO. 78.

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

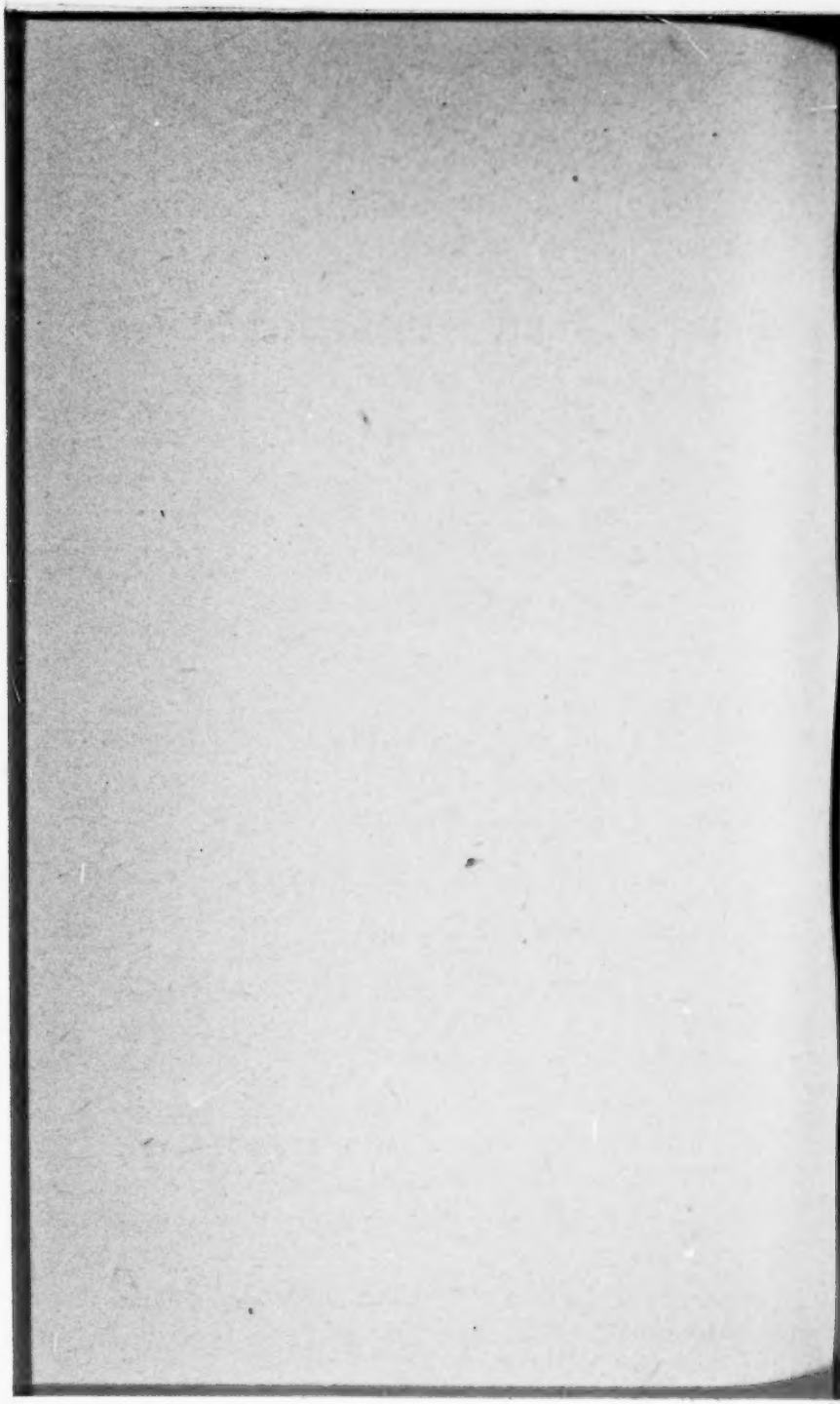
THE ABILENE COTTON OIL COMPANY,
Defendant in Error.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
THOMAS J. FREEMAN,
For the Railway Company.

J. G. Hauser, "The Legal Printer," 402 Camp St., N. O., La.



Supreme Court of the United States

OCTOBER TERM, 1906.

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

THE ABILENE COTTON OIL COMPANY,
Defendant in Error.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

The original petition in this suit was filed in the District Court of Taylor County, Texas, October 14, 1901, and in August, 1903, an amended petition was filed, the amended petition taking the place of the original petition under the Texas practice. The cause of action, as stated in said amended petition, was in substance as follows:

That in September and October, 1901, the defendant in error purchased a large amount of cottonseed at various-named places in the State of Louisiana, and said

seed was shipped to defendant in error from said Louisiana points, consigned to the defendant in error at Abilene, Texas, and that said seed was shipped to the defendant in error at Abilene, Texas, over the line of road of the Texas & Pacific Railway Company, which operates a line of road from New Orleans, in the State of Louisiana, to El Paso, in the State of Texas, Abilene being a point intermediate. It was further alleged in said amended petition that a reasonable rate from the points named in Louisiana to Abilene were rates varying from twenty-five cents per one hundred pounds to twenty-eight and three-fourths cents per one hundred pounds, but that the plaintiff in error, the Texas & Pacific Railway Company, charged and collected for the transportation of the seed a rate of sixty-seven cents per one hundred pounds. It further alleged that said sixty-seven-cent rate was unreasonable, but that the defendant in error was required to pay same in order to get possession of the seed; and it sues for the difference between the reasonable rate of from twenty-five to twenty-eight and three-fourths cents per one hundred pounds and the alleged unreasonable rate of sixty-seven cents per one hundred pounds, which was charged and collected by the plaintiff in error, the difference in the amount being the sum of $1,951.83.

Plaintiff in error answered by special exception to the effect that the defendant in error could not maintain this suit, because, under the allegations in its petition, it showed that, if it had any cause of action, said cause of

action could only be prosecuted in some United States Court of competent jurisdiction, and not in a State Court, or by proper complaint filed before the Interstate Commerce Commission of the United States. Plaintiff in error also answered by general denial, and by special answer, in substance, as follows: That at the time, and prior to the time, of the shipments as alleged in defendant in error's First Amended Original Petition, plaintiff in error had promulgated, published and posted its schedule of rates, wherein and whereby it adopted, published and posted the rate provided for transporting and carrying cottonseed in carload quantities, subject to minimum rates from the points mentioned in defendant in error's petition, to Abilene, Texas, and that said schedule of rates published and posted by plaintiff in error, in accordance with the provisions of the Interstate Commerce Act, from said points to Abilene, Texas, was sixty-seven cents per one hundred pounds, and was a through rate adopted and posted by the plaintiff in error in accordance with the provisions of the Interstate Commerce Law; that the shipments described in defendant in error's First Amended Original Petition were interstate shipments; that, having filed, published and posted said rates in accordance with the Interstate Commerce Law, plaintiff in error was not authorized to, and could not in accordance with the law, legally demand or collect from defendant in error a greater or lesser rate for the transportation of said cottonseed from the points mentioned in the First Amended Original Petition than the sum of sixty-seven cents per

one hundred pounds, as was provided in the schedule of rates adopted, published and posted in accordance with the Interstate Commerce Law; that said sixty-seven-cent rate was filed, published and posted in accordance with the provisions of the Interstate Commerce Law prior to the time of the shipments made by the defendant in error, as alleged in its First Amended Original Petition, and was in full force and effect, and no other rate than sixty-seven cents per one hundred pounds could have been charged for the transportation of said cottonseed, and the sixty-seven-cent rate was the legal rate in effect for the transportation of said cottonseed, and no other rate. (See Printed Record, pp. 6-8.) It further denied that said rate was exorbitant or unreasonable.

The case was tried by the Court without a jury, and on the 16th day of April, 1904, the Court rendered a judgment in favor of the plaintiff in error. After its finding of fact, the Court found the following conclusions of law:

> "1. The facts so found show that this was an interstate shipment.
>
> "2. The facts so found show that the plaintiff in error complied with the Interstate Commerce Law, and said rates and classifications were thereby properly established and in force; but the rate charged on cottonseed in carload lots was unreasonable and excessive.
>
> "3. I find that the rate charged by the defendant was that established under the Interstate Commerce Law, and I find for the defendant."

The judgment was accordingly entered in favor of the defendant, the Texas & Pacific Railway Company.

The defendant in error filed its appeal bond and statement of facts in due time, and the case was regularly appealed to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas. The case came on regularly to be heard in the Court of Civil Appeals, which Court, on the 25th day of February, 1905, handed down its opinion, reversing the judgment of the District Court of Taylor County, Texas, and rendering judgment in favor of the defendant in error, and against this plaintiff in error, for the sum of $1,951.83, with legal interest from October 7, 1901, and all costs. The plaintiff in error filed its motion for rehearing in said Court of Civil Appeals, which motion in due course was overruled, and the plaintiff in error, within the time required by law, made its application for writ of error to the Supreme Court of the State of Texas, which writ of error was refused. From the judgment of the Court of Civil Appeals, it being the highest Court to which the cause could be taken, the Texas & Pacific Railway Company has sued out its writ of error to this Court.

Assignments of Error.

1.

The allegations in the petition filed in the District Court of Taylor County, Texas, by the defendant in error, the Abilene Cotton Oil Company, and the testimony offered on the trial of said cause, showed that the shipment of

cottonseed was made over the line of the Texas & Pacific Railway Company from certain points in the State of Louisiana to a point in the State of Texas, and that same was an interstate shipment; and it, therefore, followed that any suit to recover damages, on account of any excessive, unreasonable or unjust freight charge made and collected by the Texas & Pacific Railway Company for the transportation of said shipment, was wholly within the jurisdiction of a Circuit Court of the United States; and that the District Court of Taylor County, Texas, had no jurisdiction to hear and determine the cause.

2.

The said Court of Civil Appeals erred in reversing the judgment of the District Court of Taylor County and rendering a judgment against the plaintiff in error, for the reason that there was a want of power in the District Court of Taylor County to assume jurisdiction over the subject matter of this suit, and the Congress of the United States had prescribed the method of procedure, and no Court save a District or Circuit Court of the United States had the jurisdiction to hear and determine the matters involved.

3.

The said Court of Civil Appeals erred in adopting the conclusions of fact found by the trial Court, and in rendering a judgment against this plaintiff in error, which action was erroneous, in that said trial Court held that the freight charges collected and received were unreasonable

and excessive, when in fact there was no evidence to sustain such findings and judgment of the Court.

4.

The trial Court held that the Texas & Pacific Railway Company had complied with the terms and provisions of the Act of Congress of February 4, 1887, entitled, "An Act to Regulate Commerce," and known as the "Interstate Commerce Act," with reference to the making, filing and publication of its tariff rates as applied to the shipment involved in this suit; and further held, as a conclusion of law, that the Texas & Pacific Railway Company was entitled to collect and receive the amount shown by this tariff rate—to-wit, sixty-seven cents per one hundred pounds.

It says that the said Court of Civil Appeals erred in not sustaining the holding of the said trial Court in this respect, and in rendering a judgment against the plaintiff in error based upon a freight rate lower than that fixed by the said published tariff rate.

5.

It says that the judgment of the District Court of Taylor County was correct, and the Court of Civil Appeals erred in reversing said judgment and in rendering a judgment against this plaintiff in error, for the reason that it appeared that the shipment involved was an interstate shipment, and that the Texas & Pacific Railway Company had fully complied with the acts of Congress and all the provisions of the act approved February 4, 1887, entitled "An Act to Regulate Commerce,"

and that, under and by virtue of the provisions of the said act and the tariff rates which had been regularly promulgated, it was entitled to receive and collect the amount it did—to wit, sixty-seven cents per hundred pounds; and neither the District Court of Taylor County, Texas, nor the said Court of Civil Appeals, upon appeal, had power to hold that said rate was unreasonable or unjust, or to fix and determine what was a reasonable and just rate, and render a judgment for the difference.

6.

It says that the judgment of the said Court of Civil Appeals is repugnant and in conflict with the laws of the United States, and especially with those several acts of Congress of the United States commonly known as "An Act to Regulate Commerce," approved February 4, 1887, and acts amendatory thereto, especially Sections 8 and 9 of said act, approved February 4, 1887.

7.

The said Court of Civil Appeals erred in reversing the judgment of the District Court of Taylor County, and in rendering a judgment against this plaintiff in error, because said judgment of the said Court of Civil Appeals is repugnant to, and in conflict with, and is contrary to, and in violation of, and in contravention with, the statutes of the United States with reference to the regulation of interstate commerce and provisions therein claimed.

8.

The said Court of Civil Appeals erred in rendering any judgment herein against plaintiff in error, because there

were drawn in question the construction and application of the statute of the United States, under which plaintiff in error claimed a right, title, privilege and immunity, and the decision of the said Court of Civil Appeals was against the right, title, privilege and immunity thus set up and claimed by plaintiff in error.

9.

The said Court of Civil Appeals erred in holding that, although the regular published tariff rate under the terms and provisions of the Interstate Commerce Act was sixty-seven cents per hundred pounds, and which amount the said plaintiff in error collected, yet the said Court, as well as the District Court of Taylor County, had the jurisdiction and power to set aside said regular published tariff rate, and to hold that same was unreasonable and unjust, and to hear and determine what was a reasonable and just rate to be charged, and to render a judgment for any unreasonable and excessive amount charged and collected.

10.

The interpretation placed on the Interstate Commerce Act by the said Court of Civil Appeals for the Second Supreme Judicial District of Texas is contrary to, in violation of, and in contravention with, the statutes of the United States as to the regulation of interstate commerce.

BRIEF.

There are two Federal questions raised in this case, both of which were specifically set up and claimed by the Texas & Pacific Railway Company in the court below, as fully appears in the record. (See answer of the Texas & Pacific Railway Company, Tr., pp. 6, 7 and 8, setting up its alleged rights under the Interstate Commerce Act.) One of these Federal questions is to the effect that the defendant in error's cause of action, if any it had, exists by virtue of a law of the United States—to wit, the Interstate Commerce Act of Congress, entitled, "An Act to Regulate Commerce," approved February 4, 1887—and that, by the terms of said act, a cause of action such as is alleged by the defendant in error could only be enforced in the United States Courts having jurisdiction or before the Interstate Commerce Commission, as provided by said Act to Regulate Commerce, approved February 4, 1887, and amendments thereto, and that such a cause of action as defendant in error alleged in his petition could not be maintained and enforced in a State Court. This question was decided against the plaintiff in error.

The second Federal question was to the effect that the only lawful rate that the plaintiff in error could charge for transporting the cottonseed was that set forth in its duly-filed, published and posted tariff, in accordance with the Act to Regulate Commerce, approved February 4, 1887, and amendments thereto, and that this rate was sixty-seven cents, and was the rate charged, and the only

lawful rate that could be charged, by the plaintiff in error. This question was raised and decided against the plaintiff in error by the Court of Civil Appeals. The judgment of the said Court of Civil Appeals was and is the final judgment of the highest Court in the State in which a decision in this case can be had. That said decision of the Court of Civil Appeals is repugnant to, and in conflict with, the laws of the United States and the Interstate Commerce Act, and especially Section 8 and Sections 9 and 10 of the said Act to Regulate Commerce, approved February 4, 1887. The plaintiff in error claimed title, right and immunity under and by virtue of the said act, and there were drawn into question the construction and application of the said act, and the decision of the said Court of Civil Appeals was against the right, title and immunity claimed thereunder.

There is no disputed question of fact in the record. The facts as alleged in plaintiff in error's answer were found to be true, both by the District Court of Taylor County and by the Court of Civil Appeals, Second Judicial District. (See Record, pp. 30 and 37.) There are two questions involved in this case as before set out:

1. Could the defendant in error maintain a suit of this kind in the State Courts?

2. Does a cause of action lie against a railway company for the difference between the legal rate printed, published and posted in accordance with the provisions of the Interstate Commerce Act and a lower rate alleged to be a reasonable rate by a shipper of interstate freight,

the lower rate not having been printed, published and posted in accordance with the Interstate Commerce Act, but to be determined by the judgment of a State Court?

We submit the following propositions of law as decisive of the first question raised:

1. If an Act of Congress gives a right to a party aggrieved without specifying a remedy, it might be enforced in a State Court; but, if a right is conferred by statute and a specific remedy provided, or a new power and means of execution granted, the right can be enforced only in the mode provided in the act.

2. A party who seeks damages alleged to have been sustained in consequence of a violation by a common carrier of the Interstate Commerce Law, as the act provides for redress by a procedure either before the Commission or by suit in a Federal Court, cannot bring suit before a State Court, which is without jurisdiction to enforce the right, but is relegated exclusively to the Commission or Federal Court; otherwise, the party would have a third alternative or mode of redress not contemplated by the act. He is restricted to one of two remedies.

3a. Where a right arises under the laws of the United States, Congress may, if it sees fit, give to the Federal Courts exclusive jurisdiction.

3b. When a right is given by statute, and a specific remedy provided, or new power, and also the means of execution, the power can be executed, and the right vindicated, in no other way than that prescribed by the act.

3c. **The Interstate Commerce Act providing that remedies thereunder must be sought in the Federal Courts or before the Interstate Commerce Commission, but not in both, by necessary implication excludes the idea of jurisdiction in any other tribunals. The act confers the right and provides the remedy and means of enforcement.**

Authorities under above propositions:

Interstate Commerce Act, February 4, 1887, and Amendments 1, Supp., R. S., p. 529, especially Secs. 8 and 9.

Frank T. Copp vs. L. & N. R. R. Co., 43 La. 511-514.

G. C. & S. F. vs. Moore, 83 S. W. 362.

Van Patten vs. Chicago, M. & St. P., 74 Fed. 981.

Ex Parte McNeil, 13 Wallace, 236.

Gilman vs. Philadelphia, 3 Wallace, 713.

Swift vs. Philadelphia R. R. Co., 58 Fed. 858.

Claflin vs. Houseman, 93 U. S. 130 (see p. 137.)

The Moses Taylor, 4 Wallace, 411, 425 to 431 for opinion.

Story on the Constitution, Secs. 436-447.

We submit the following propositions of law as decisive of the second question raised:

The only lawful rate that can be charged and collected by common carrier upon an interstate shipment is the legally-filed, published and posted rate under the Act to Regulate Commerce, and no cause of action for damages or otherwise will lie against a carrier for collecting its duly-published, filed and posted rates. If this rate be unreasonable, the only remedies the shipper has are those provided in Section 9 of the Interstate Commerce Act. By the terms of the Interstate Commerce Act, and espe-

cially Section 2, it is illegal for either a corporation or person to give or receive any rebate, concession, etc., and declaring same to be unlawful, and the person or corporation so doing to be guilty of a misdemeanor. By Sections 6 and 10 of the Interstate Commerce Act, approved February 4, 1887, it is provided that it shall be a misdemeanor and unlawful, punishable by a fine, for any person, persons or corporations to grant, give or solicit, accept or receive, any rebate or concession in respect to the transportation of property in interstate or foreign commerce, whereby any such property shall be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to Regulate Commerce and the acts amendatory thereof.

Authorities:

Texas & Pacific Ry. Co. vs. Mugg & Dryden, 202 U. S. 242.

Hefley vs. Railway Co., 158 U. S. 98.

Southern Ry vs. Harrison, 119 Ala. 539.

M. K. & T. Ry Co. vs. Trinity Lumber Co., 1 Tex. Civ Appeals, 553.

Texas & Pacific Ry. Co. vs. Clark, 4 Tex. Civ. Appeals, 611.

M., K. & T. Ry. Co. vs. Stoner, 5 Tex. Civ. Appeals, 50.

Dillingham, Etc., vs. Fischel, 1 Tex. Civ. Appeals, 546.

S. A. & A. P. Ry. Co. vs. Clements, 20 Tex. Civ. Appeals, 498.

Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887. 1st U. S. Statutes 529 and amendments thereto.

ARGUMENT.

Under the first propositions of law to the effect that the State Courts have no jurisdiction to entertain a suit of this character, we respectfully submit that this is a question of more than passing interest; that the decision of same goes to the very foundation of the Act to Regulate Commerce, known as the "Interstate Commerce Act"; that, should this Court hold that a suit of this nature could be maintained in the various courts of the States, the practical effect of such a decision would be to annul and make inoperative the principal features of the Act to Regulate Commerce; and, so far as the practical workings of the Act to Regulate Commerce are concerned, it would render it nugatory and of no effect. The Act of February 4, 1887, known as the "Interstate Commerce Act," and the amendments thereto, had in view, not the regulation of interstate commerce in a general way, but the specific purpose of regulating the rates, rules and fares that should govern the movement of interstate commerce, and the act treats the subject of such legislation as a whole, and has attempted to cover the entire field of such regulation. It provides, in express terms, as to what common carriers shall come within the purview of the act, and it then, in express terms, adopts as a part of the act, and practically adopts as a rule upon which the other provisions are based, the rule of the common law in effect as to compensation for services rendered by common car-

riers in the transportation of property. The last paragraph of Section 1 of the act provides as follows:

> "All charges made for any service rendered, or to be rendered, in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

This is but an enunciation of the common law as applied to the transportation of passengers and property by common carriers. The act then further provides for the filing, publishing and posting of the rates, fares and charges of the common carrier, and provides that such filing, publishing and posting shall be necessary in order to make the rates on interstate commerce lawful. The only rates that can be legally charged by a common carrier for transporting interstate commerce are those that have been filed, published and posted in accordance with the Act to Regulate Commerce, and a severe penalty is provided under the original act. (See Section 10 of the Act to Regulate Commerce, approved February 4, 1887, as amended in 1889, and the Elkins amendments to said original act, approved February 19, 1903, which last act was amended by the last Congress, the amendment taking effect on July 29, 1906.) Both the original Interstate Commerce Act and the amendments thereto provide in detail what the carrier must do in order to make its rates, fares and charges legal. But both the act and the amendments thereto, after providing as to how a legal and law-

ful rate may be made by the carrier, does not leave the shipper or the public without a remedy to enforce the common-law rule adopted in this act—that such rates, fares and charges shall be reasonable and just. The act itself makes express provisions for relief against an unreasonable or unjust rate, and by express terms it provides the means and names the court and tribunal that may be resorted to by the shipper should he be dissatified with the rates, fares and charges that have been legally published, posted and filed by the railway company, and provides the means and the Court to test the reasonableness of such rates, fares and charges. Sections 8 and 9 of the Act of February 4, 1887, give to the shipper the right to attack any rate or fare for unreasonableness, and provide two tribunals, in either of which he may attack the rates, fares and charges as unjust and unreasonable. If he elects he may bring his suit to attack the unreasonableness of a rate, and for damages on account of being charged an unreasonable rate, in a Federal Court of competent jurisdiction. If he does not elect to sue for his damages in a Federal Court on the ground of the rate being unreasonable, he may file his complaint before the Interstate Commerce Commission, and attack the rate as unreasonable, and, upon the finding of the Interstate Commerce Commission that the rate is unreasonable, a suit could be instituted upon the equity side of the docket of the Federal Court to enjoin the carrier from further charging such unreasonable rate. In addition thereto, the Commission could

indicate in their report that the shipper was entitled to a fixed amount in reparation for his damages on account of the unreasonable rate, and the shipper could institute suit in a Federal Court of competent jurisdiction to enforce this finding of the Commission. The law, Section 9, expressly prohibits, however, the shipper from exercising both remedies, but forces him to elect as to which of the remedies he would resort to, and in both instances expressly fixes and provides the forum or tribunal in which his right must be asserted. Since the amendment of June 28, 1906, in the event of complaint to the Commission of the unreasonableness of a rate, the Commission, in addition to awarding him damages, could also fix by its order a rate to be charged by the carrier in the future, which the carrier would be forced to comply with or else enjoin same in the Federal Court. It can be seen from these provisions that the entire question of regulation of rates has been dealt with in detail. The rights of the shipper, the remedies of the shipper, the rights of the railway, and the remedies of the railway, and the rights of the general public, are all fully provided for and fully protected. The entire Interstate Commerce Act shows a perfect and complete plan in itself, and it is clearly not intended by the act that any of its provisions should be dependent upon the rule provided by any State statute, or by a rule or decision that might be laid down by any State Court. The act, by express provisions and by necessary implications, deprives the State Courts of any jurisdiction to grant relief or to adjudicate the questions

that might arise under and by virtue of the Act to Regulate Commerce, known as the "Interstate Commerce Act," and expressly deprives the State Courts of any jurisdiction or right to adjudicate and establish what is a reasonable and just charge for transporting interstate commerce; and the wisdom of the law is apparent upon its face, for, if this were not true, what a chaotic condition of affairs would exist! One shipper of interstate commerce in Texas might obtain a verdict of a jury, or a Justice of the Peace, to the effect that the legally-published, posted and filed rates on an interstate shipment were unreasonable. The Interstate Commerce Commission, at the instance of another shipper, might hold it reasonable, or a Federal Court might hold it reasonable. Or a Justice of the Peace in one county, or in one precinct, might hold a rate reasonable, while another Justice of the Peace, in the same county and in the same precinct, might hold it unreasonable, so that the reasonableness or unreasonableness of the legally-published rates on interstate commerce would depend upon the whim of a jury or Justice of the Peace. To further illustrate the unjustness of such a situation, I would call attention to the fact that in the State of Texas no appeal lies from a suit in a Justice's Court where the amount involved is less than $20. (Revised Statutes of Texas 1895, Article 1568 and Article 1158.) No appeal will lie from the County Court in the State of Texas unless the amount in controversy or the judgment rendered shall exceed $100 exclusive of interest and costs. (Revised Statutes 1895, Article 996.)

The officers who preside over the County and Justice's Courts in Texas are not required by the Constitution and laws of the State to be learned in the law; and the Supreme Court of Texas has held that no presumption would arise in cases tried before Justices of the Peace, or the County Court, where the amount was too small to appeal, that the law had not been correctly applied. (See *Railway vs. Dowe*, 70 Tex., pp. 6 and 10.) And yet, if this Court should hold that the State Courts have jurisdiction to try the question of the reasonableness or unreasonableness of interstate rates put in effect by the carriers under the Act to Regulate Commerce, these very Courts would be the ones that would try most of the cases, and no writ of error would lie to any Federal Court, for no Federal question exists, as they claim jurisdiction under the common law and not under a Federal statute. This state of affairs was never contemplated by the act, and we submit that every expression and every implication is against it. The learned Court of Civil Appeals seems to have given some weight to the provision of Section 22 of the Interstate Commerce Act, which is as follows:

> "Nothing in this act contained shall alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

We submit that it was not the intention of this provision to confer jurisdiction upon State Courts to enforce the provisions of the act, because the act specifically provides the Courts in which rights arising under the act

shall be enforced; but this paragraph is merely an announcement that whatever remedies that may have existed, either at common law or statute, might be resorted to to carry out the provisions of this act, and were not repealed by it. The Interstate Commerce Act prevents pooling by one provision—Section 7. It was not intended that the general statute of the United States, prohibiting unlawful combinations by pools or otherwise, should be repealed or interfered with in any way, nor the right to resort to injunction if necessary, nor the right to resort to any other remedy for wrongs or evils not specified or covered by the act; but, in the matter of attacking a rate as unreasonable, and in seeking damages therefor, the act is specific, and has provided a specific forum and tribunal. The next provision following the provision above quoted expressly confers upon the District and Circuit Courts of the United States jurisdiction for a violation of the law. The vice in the opinion of the Court of Civil Appeals of Texas in this case, and in the companion case of the *Texas & Pacific Railway Company vs. Cisco Oil Mills*, being Cause No. 79, is that the Court did not consider the fact that no new right was created by the Interstate Commerce Act in the shipper to sue for an unreasonable rate, but his right by the common law was embodied in a law of the United States, and a means and a Court for its enforcement provided; and whether or not the common law was in effect in the United States was of no importance whatever, for the reason that the Interstate Commerce Act itself expressly adopted the rule of

the common law, and has expressly provided that, in this class of cases, jurisdiction is confined exclusively to the Courts of the United States. If no provision had been made in the act for its enforcement in Courts of the United States, then there would have been some ground for the Court of Civil Appeals holding that it was a right that could be enforced in any Court, State or Federal, because there is no provision in the Constitution of the United States, nor in the laws made in pursuance thereof, prohibiting State Courts entertaining jurisdiction over matters arising out of interstate commerce; but, when a statute of the United States specifically provides the Court in which the right may be enforced, this is to the exclusion of the right to enforce the remedy in a State Court, and this is the distinction that the Court of Civil Appeals did not make. The very decisions upon which it relies to support its opinion—to wit, 62 Federal Reporter, page 24—expressly recognizes the rule announced above. The case of *Tift vs. Southern Railway*, 123 Federal Reporter, 790, recognizes the rule as announced above. The case of *Interstate Commerce Com. vs. N. O. & T. & P. Ry. Co.*, 167 U. S. 502, relied upon by the Court of Civil Appeals, is a direct authority in favor of the views of the plaintiff in error in this case. On page 505, in summing up the provisions of the Interstate Commerce Act, the learned Judge says:

> "3. Incorporating into a situation the common-law obligation resting upon the carrier—to make all of its rates reasonable and just—and directing the Commission to execute the provisions of the act," etc.,

showing that this Honorable Court has recognized that the common-law provision has been embodied in the statute. There is no contention, upon the part of the plaintiff in error, that the common-law provision has not been embodied in the statute, but there is a grave distinction between the embodying of the common-law provision in the statute, making the common law effective in the United States, and the giving to State Courts jurisdiction to enforce the rights conferred under the Interstate Commerce Act; and the learned Court of Civil Appeals failed to make the distinction between the jurisdiction of a State Court to enforce the common law and the question of a common-law right existing.

We earnestly submit that the Court of Civil Appeals erred in holding that the rights sought to be enforced in this suit could be enforced in a State Court, and this view is supported by the authorities cited in this brief.

As to the second proposition of law involved in the assignments of error, to the effect that no cause of action would lie against the plaintiff in error in a suit of this character, for the reason that the admitted facts show that the rate as charged by the plaintiff in error was the duly-published, posted and filed rate in accordance with the Interstate Commerce Act, we beg to submit that this is a question that is no longer open to discussion, as the same question was decided by this Honorable Court in the case of *Texas & Pacific Railway Company vs. Mugg & Dryden*, 202 U. S. 242, this Court holding that the legally-published, posted and filed rate of the carrier on interstate

shipments must be charged and collected, and that no agreement or arrangement or contract to the contrary would relieve it of this duty, and that no cause of action, either in contract or damages, would lie against it for having complied with its duty in this respect. As before stated herein, the shipper had his remedy, which he could have asserted either in a court of competent jurisdiction—to wit, a Federal Court—or before the Interstate Commerce Commission.

For the errors assigned, we respectfully ask that the judgment of the Court of Civil Appeals be reversed and the cause remanded, with instructions to render judgment in behalf of the Texas & Pacific Railway Company.

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Counsel for the Texas & Pacific Railway Company.

No. 78.

FILED.
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JAMES H. McKENNEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1906.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs

THE ABILENE COTTON COMPANY,
Defendant in Error.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

BRIEF FOR DEFENDANT IN ERROR.

HANNIS TAYLOR,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1906.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

v.

THE ABILENE COTTON OIL COMPANY,
Defendant in Error.

In error to the Court of Civil Appeals for the second Supreme Judicial District of the State of Texas.

BRIEF FOR DEFENDANT IN ERROR.

I.

HIGHEST COURT OF A STATE MAY ADMINISTER THE COMMON LAW ACCORDING TO ITS OWN UNDERSTANDING AND INTERPRETATION.

It is firmly settled here that the highest court of a State may administer the common law according to its own understanding and interpretation without liability to a review in the Federal Supreme Court, unless some right, title, immunity or privilege, *the creation of the Federal power*, has been asserted and denied. Pennsylvania R. R. Co. *v.* Hughes, 191 U. S. 477. In that case this Court said: "But this is not a question of Federal law wherein the decision of the highest Federal tribunal is of conclusive

authority. * * * The cases are numerous and conflicting, different rules prevailing in different states. The Federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the Hart case, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court where some right, title, immunity or privilege, the creation of the Federal power, has been asserted and denied. Bethell *v.* Demaret, 10 Wall. 537; Delmas *v.* Merchants' Mut. Ins. Co., 14 Wall. 666; New York L. Ins. Co. *v.* Hendren, 92 U. S. 287; United States *v.* Thompson, 93 U. S. 586." Where no right, title, immunity or privilege, the creation of the Federal power, is involved, the highest court of the State of Texas has final jurisdiction, without review here, to determine that under the common law as administered in that State, a railroad company is subject, as a common carrier, to the common law liability for unreasonable, unjust and discriminative freight charges. From the opinion of the highest court of Texas (Tr. p. 38) we learn: "In this state it is declared by express legislative enactment that the common law of England (so far as it is not inconsistent with the constitution and laws of this State), shall, together with such constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature. R. S. Art. 3,558." Under that common law, which it has an exclusive right to administer "according to its understanding and interpretation," the Court of Civil Appeals adjudged in this case, "that the

appellee (The Texas and Pacific Railway Co.), in demanding and receiving the excessive freight rate as found by the Court, violated a common law right of the appellant in this case." (Tr. p. 39.) A jury being waived in the primary court, a finding of facts was there made by the judge, who determined "That said charge was unreasonable, unjust and extortionate." In the Court of Civil Appeals this conclusion was reached: "It must follow that upon the facts the judgment should have been for appellant. We therefore adopt the trial court's finding of fact, and, applying thereto the principles of law we have adduced, reverse the judgment and here render judgment in appellant's favor for the said sum of $1,951.83, excessive freight charges, together with interest thereon."

II.

HAD THAT COMMON LAW RIGHT, AS THUS ADMINISTERED, BEEN TAKEN AWAY BY THE INTERSTATE COMMERCE ACT, APPROVED FEBRUARY 4, 1887?

Counsel for plaintiff-in-error make here a single contention, and that is, that the common law right, which the highest court of the State of Texas has attempted to administer, had been taken away by the Interstate Commerce Act of 1887, "by necessary implication." There is no pretence that it was so taken away in express terms. The language of the Brief is this: "3c. The Interstate Commerce Act providing that remedies thereunder must be sought in the Federal courts or before the Interstate Commerce Commission, but not in both, *by necessary implication excludes the idea of jurisdiction in any other tri-*

bunals," p. 13. On p. 12 the matter is thus stated: "A party who seeks damages alleged to have been sustained in consequence of a violation by a common carrier of the Interstate Commerce Law, as the act provides for redress by a procedure either before the Commission or by suit in a Federal court, can not bring suit before a State court, which is without jurisdiction to enforce the right, but is relegated exclusively to the Commission or Federal Court; otherwise, the party would have a third alternative or mode of redress not contemplated by the Act. He is restricted to one or two remedies." Passing over the Irish bull involved in "a third alternative," it must be said here that the fundamental fault in the above statement is the assumption that the defendant in error is seeking damages "in consequence of a violation by a common carrier of the Interstate Commerce Law." Defendant-in-error makes no such claim. Its claim is for damages suffered in consequence of a violation by a common carrier of its common law right to be exempt from unreasonable, unjust, and discriminative freight charges. The single question is whether that common law right, as administered by the highest court of the State of Texas, has been taken away by reason of the fact that the Interstate Commerce Act has conferred upon the shipper cumulative remedies. The single issue is therefore one of statutory construction.

The following principles have been recognized by this Court from its foundation. "(4) *Statutes in Derogation of Common Law.* (a) In General.—It is a well established rule of construction that statutes in derogation of the

common law are to be strictly construed, and hence, while a statute which is plainly inconsistent with the common law will prevail, yet statutes are not presumed to make any alteration in the common law further or otherwise than the clear import of the statutory language necessarily requires." Am. and Eng. Enc. of Law, Vol. 26, p. 662, and authorities cited, including Brown *v.* Barry, 3 Dall. 365; Wilson *v.* Lenox, 1 Cranch, 211; McCool *v.* Smith, 1 Black, 459; Shaw *v.* R. Co., 101 U. S. 557.

Affirmative words without negative words do not annul the common law. Unless the intent of a statute is manifest, irresistable, the constructive repeal of the common law, *by implication*, can not be inferred. Jennings *v.* Com., 17 Pick. 82; State *v.* Norton, 23 N. J. L. 39.

New remedy cumulative. "When an affirmative statute introductory of a new law directs a thing to be done in a certain manner, that thing shall not, even in the absence of negative words, be done in any other manner; *but when the statute merely provides a new remedy for a pre-existing right*, and contains no negative express or implied of the old remedy, the new remedy is merely cumulative. * * A statute instituting a new remedy for an existing right does not take away a pre-existing remedy without express words or necessary implication; the new remedy is cumulative and either may be pursued." Am. and Eng. Enc. of Law, Vol. 26, pp. 614, 671, and authorities cited. Counsel for plaintiff in error do not attempt to deny that the common law remedy in question existed under the common law of Texas, prior to the enactment of the Interstate Commerce Law of 1887. Their sole contention is that it

was annuled "*by necessary implication*," by the passage of that Act. The implications are all the other way. This Court must hold that the new remedies provided by the Act are simply cumulative, unless it sees fit to disregard all of the elementary principles of statutory construction which govern the subject.

III.

"Interpretation Clause" in the Interstate Commerce Act of February 4, 1887.

So far the fact has been ignored that the acting question contains an interpretation clause in which Congress has specially defined its meaning in certain respects so that it can not by possibility be misunderstood. The terms of the interpretation clause are as follows: "Sec. 22. That nothing in this Act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion or commutation passenger tickets. Nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; *and nothing in this Act contained shall in any way abridge or alter* THE REMEDIES NOW EXISTING AT COMMON LAW or *by*

statute, but the provisions of this Act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this Act." "A legislative construction of an act embodied in the act itself is binding on the Courts." Am. and Eng. Enc. of Law, Vol. 6, p. 1035, citing Smith *v.* State, Ind. 321. A statutory declaration contained in the body of an act declaring the meaning thereof as well as the intent of the legislature in enacting it, is mandatory and controlling on the courts. Farmers' Bank *v.* Hale, 59 N. Y. 53; Com. *v.* Curry, 4 Pa. Super. Ct., 356; Snyder *v.* Compton, 87, Tex. 374; Rossmiller *v.* State, 114 Wis., 169. This Court is therefore bound by the statutory declaration contained in the body of this Act to the effect that "*Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.*" Congress had a perfect knowledge of pre-existing law when the acting question passed. It knew the immemorial remedy which the common law gave a shipper in such a case. Its purpose was to supplement that ancient remedy by new statutory remedies. It therefore in the interpretation clause expressly declared that the ancient common law remedy should neither be altered nor abridged. Then it was careful to declare further that the remedies contained in the Act "are in addition to such remedies" as previously existed.

In the dissenting opinion filed in Missouri P. P. Co. *v.* United States, 189 U. S. 274, Justices Brewer and Harlan, after quoting the interpretation clause contained in sec. 22, concur in the following statement: Every remedy, there-

fore, that the government or any individual had to compel the performance by carriers of interstate commerce of their legal obligations remains unaffected by that act. On the contrary, as we have seen, it expressly provides that all other remedies are left unaffected by the act, and a duty cast by statute *equally with a common-law duty* may by the very language of the act be enforced in any manner known to the law."

And yet despite the settled rules of construction in such a case, despite the clear and explicit declarations of the interpretation clause, counsel for plaintiff in error are urging the court so to construe the statute in question as to abrogate the common law remedy by implication. The futile attempt made to explain away the interpretation clause need not be specially mentioned, as it is not serious.

IV.

No right, title, privilege or immunity under a Federal statute specially pleaded and set up in the State court, was denied by that court.

It has been here held that "it is not every case where a Federal statute has been construed by a state court that gives a right of review to this Court, but the claim of any right, title, privilege or immunity under the statute must have been denied by the state tribunal in order to give us jurisdiction to review its judgment. That a Federal statute was construed unfavorably to one of the parties to the suit is no ground for jurisdiction by this Court, unless such construction was not only unfavorable but was against the right, etc., specially set up and claimed

under the statute." Kizer *v.* Texarkana and Fort Smith Railway Co., 179 U. S., 199. Even if the state court could not try questions involving the construction of the Interstate Commerce Act, yet this suit being brought on the common law of liability of plaintiff in error, jurisdiction to hear and determine the facts pleaded by defendant in error could not be defeated by facts outside of the allegations unless a plea had been interposed to the jurisdiction; such plea showing want of jurisdiction in the trial court and further showing a court with jurisdiction. In this case the petition declaring alone on the general or common law liability of plaintiff in error, and want of jurisdiction not appearing from allegations in the petition, before the court could entertain the question of jurisdiction by reason of plaintiff having complied with certain essentials and formalities required by the Interstate Commerce Act, such facts should have been pleaded by plaintiff and the question of jurisdiction raised by proper plea questioning the jurisdiction of the state court. Therefore, even if the primary court was without jurisdiction by reason of the Federal statutes, before such facts could be urged they should have been presented by a proper plea, in due order of pleading; and there being no such plea the primary court erred in considering the question of jurisdiction. Plaintiffs by its answer having invoked a hearing of the facts as matter defensive, and not in bar, and having justified the charges by reason of the rate being fixed, etc., by alleged compliance with the Federal law, and having pleaded in defense and justification of the charges, that same were not unreasonable and were not exorbitant, it

thereby submitted to the jurisdiction of the Court and thereafter could not claim that the court was without jurisdiction, the subject-matter being within the general jurisdiction of the Court.

If in any event a carrier can justify or escape liability for charging unjust, unreasonable, extortionate, and discriminative rates by reason of the Interstate Commerce Act, it must at least show that the provisions of such law have been complied with. And as the facts herein show that the shipments in question were from points on defendant's line in Louisiana to points on its line in Texas, what is known as an "individual" schedule was required by said Act, showing such rates; and as the evidence and findings show that no such "individual" schedule had ever been established or published, and that only a "joint schedule" between defendant and a number of other roads was attempted to be established and published, there was not established under the said Act any rates between said shipping points.

Even should it be contended that said "joint schedule" can be made the basis of rates under the Interstate Act, same can not prevail herein as "shippers are not effected by the Act until the required publication of rates has been made, and to bring them within its operation in a given case, the burden is upon the carrier to show compliance with that condition precedent," and as the schedules introduced by defendant were "joint schedules" and the act requiring such publication to be made thereof as the Commerce Commission might prescribe, and there being nothing to show what publication was required, the rates

mentioned in the "joint schedule" were not established or operative. There was an utter want of testimony as to what publication the commission had required, and there is no finding as to this, the record being silent. The primary court found that the "joint schedule" was filed with Commission, and that copies of same were kept in the office of plaintiff at said points of shipment and at destination; that is, in freight offices and depots for inspection of the public "as admitted by plaintiff, which admission is found in the statements of facts." The admission referred to was to effect that tariffs and classifications had been published in pamphlet form and copies filed in plaintiff's office at Abilene and at plaintiff's offices at points of shipment, but it was not admitted that they had been properly filed or published. The primary court found that the "joint schedule" had been filed with the commission. On these findings the primary court based its conclusion that plaintiff had complied with the Interstate law and the rates properly established. These conclusions were excepted to and especially for the reason that there was no testimony showing or tending to show that the law as to publications of joint schedules had been complied with.

AUTHORITIES.

Interstate Commerce Act, Sec. 6, providing for measure of publicity to be given to joint schedules, U. S. Compiled Stats., 1901, p. 3,157.

Chicago & N. W. Ry. *v.* Osborne, 52 Fed., 912; 3 C. C. A., 347.

Atlanta, K. & N. Ry. *v.* Horne, 59 S. W. (Tenn.), 134.

This being a contest with respect to shipments between points on plaintiff's line, to have the benefit of the Interstate Commerce Act against defendant it devolved on plaintiff to show the publication exacted and required by the act itself; in other words, the act requiring that "such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected," as a condition precedent to the due establishment of rates; the requirements enumerated in such act must be complied with and the evidence must show such compliance, and the evidence and the findings showing that such requirements had not been met, plaintiff can not defend by reason of said Act. The burden is on the carrier to show affirmatively that the required publication has been made; the Act not being self-executing as to the public no presumptions will be indulged.

It should not be seriously insisted that the facts show a publication in keeping with the Act. It is not the filing with the commission that establishes the rates; the commission is in no sense a judicial body; it has nothing to do with making the rates; it can not refuse to file rates tendered by the carriers, however unjust they may be. True, after filing and the establishment of them the commission can inquire into the facts and if it finds the rates unjust it can so find, and then go to a court and seek a judicial remedy, and such finding by the commission will

be considered *prima facie*, but not conclusive on the courts. No presumptions attach to or follow the action of the commission. At the time of these shipments its authority was clerical only; it could make no inquiry before filing; it could only file.

In the event it should be held that a statutory publication of a "joint tariff or schedule" complied with the Interstate Commerce Act and thereby rates were established between points on appellee's line, then before it can be so held the appellee must show that the statutory requirements as to publication have been complied with; and as the Act provides that such "carriers shall print and keep open to public inspection schedules showing, etc. * * * The schedules printed as aforesaid * * * shall plainly state the places * * * and contain the classification of freight in force * * * and shall also state. * * *

Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station or office of such carrier where passengers or freight respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected;" and agreement of parties, "that the tariffs and classifications mentioned in the depositions of E. A. Mosley, (a witness for plaintiff), have been published in book and pamphlet form, and that copies have been filed in the T. & P. office at Abilene for the inspection of the public and that they were filed at the time of these shipments and were also in the T. & P. offices at the points of the origin of the shipments, but as to whether they

were properly filed and published is not admitted," does not show compliance with the terms and requirements of the Act. "The verb post is defined: to attach to a sign post or other usual place of affixing public notices; to advertise, as to post a notice." "Public" means in open view; "conspicuous" means open to view, catchy to the eye, easy to be seen, manifest. Century Dictionary. A finding that such schedules had been filed does not meet the requirement of the act. "Filing" does not mean publicity or conspicuousness; it means the reverse.

The facts found by the primary court did not authorize the conclusion of law that plaintiff complied with the Act and that the schedules were properly established and in force, for this conclusion of law is predicated on the said ninth finding, and as it merely finds that same were kept in the offices of plaintiff, etc., such finding did not authorize the conclusion that such finding established is a matter of law compliance with the Act.

There is nothing in this record which will justify a reversal of the judgment rendered by the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

HANNIS TAYLOR,

Counsel for the defendant in error.

Supreme Court of the United States.

No. 78.—October Term, 1906.

The Texas and Pacific Railway Company, Plaintiff in Error, *vs.* The Abilene Cotton Oil Company.	In error to the Court of Civil Appeals for the Second Supreme Judicial District for the State of Texas.

[February 25, 1907.]

Mr. Justice White delivered the opinion of the Court.

The oil company, the defendant in error, sued to recover $1,951.83. It was alleged that on shipments of carloads of cotton seed made in September and October, 1901, over the line of the defendant's road from various points in Louisiana east of Alexandria, in that State, to Abilene, Texas, the carrier had exacted, over the protest of the oil company, on the delivery of the cotton seed, the payment of an unjust and unreasonable rate, which exceeded in the aggregate, by the sum sued for, a just and reasonable charge. There were, moreover, averments that the rate exacted was discriminatory, constituted an undue preference, and amounted to charging more for a shorter than for a longer haul. Besides a general traverse, the railway company defended on the ground that the shipments were interstate, and were, therefore, covered by the act of Congress to regulate commerce. It was averred that as the rate complained of was the one fixed in the rate sheets which the company had established, filed, published and posted, as required by that act, the State court was without jurisdiction to entertain the cause, and even if such court had jurisdiction, it could not, without disregarding the act to regulate commerce, grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission.

The trial court made findings of fact. Those relating to the subject of the establishing, filing and publishing by the railway company of rate sheets containing the rate which was complained of were as follows:

"7th. That the Western Classification Committee, agent and representative of numerous railways and of defendant, filed with the Interstate Commerce Commission what is known as the Western Classification, giving classifications of different articles or items of merchandise, and in same cotton seed is classed as 'A;' that this was the joint act of a number of roads, and the defendant adopted said joint classification; that on May 30, 1901, the Southwestern Freight Committee, agent of a number of roads

and agent of defendant, filed with the said commission a supplement for numerous roads in connection with defendant, whereby the rate on cotton seed from all points in Louisiana east of Alexandria was fixed at 67 cents per 100 pounds to all points in Texas from all points in Louisiana east of Alexandria and west of Alexandria.

"8th. That said classification and said rate schedule was adopted by defendant and was filed by said S. W. Freight Committee with said Interstate Commerce Commission in behalf of defendant.

"9th. That copies of said schedule and said tariffs and classifications were kept in the office of said defendant at said points of shipment and at said Abilene, that is, in the freight office and depots, for the inspection of the public, as admitted by plaintiff, which admission is found in the statement of facts.

"10th. That other than said schedule and classification nothing has been filed with the Interstate Commerce Commission by or in behalf of defendant in the way of classifications, schedules or rates on cotton seed from points on its road in Louisiana to points on its road in Texas."

From the facts found the court stated the following as its conclusions:

"1st. The facts so found show that this was an interstate shipment.

"2d. The facts so found show that the defendant complied with the interstate commerce law, and said rates and classifications were thereby properly established and in force, except that the rate charged on cotton seed in carload lots was unreasonable and excessive.

"3d. I find that the rate charged by the defendant was that established under the interstate commerce law."

As nothing in these conclusions relates to the averments of discrimination, undue preference, or a greater charge for a shorter than for a longer haul, those subjects, it may be assumed, were considered to have been eliminated in the course of the trial.

There was judgment for the railway company. When the controversy came to be disposed of by the Court of Civil Appeals, to which the cause was taken, that court deemed there was only one question presented for decision; that is, whether, consistently with the act to regulate commerce, there was power in the court to grant relief upon the finding that the rate charged for an interstate shipment was unreasonable, although such rate was the one fixed by the duly published and filed rate sheet, and when the rate had not been found to be unreasonable by the Interstate Commerce Commission. In opening its opinion the court said (85 S. W. 1052):

"Adopting the construction of the pleadings evidently given them in the briefs, and treating it as presented, the case, briefly stated, is an action by appellant for damages for a violation of an alleged common law right, in that appellee demanded and coercively collected from appellant freight charges in excess of a reasonable compensation, for the transportation of a number of carloads of cotton seed from the town of Cotton Port and other designated towns in the State of Louisiana to the city of Abilene in the State of Texas."

After referring to the findings as to the unreasonableness of the charge exacted, and after pointing out that the railway company had not, by a cross assignment, challenged the correctness of the findings of the trial court as to the unreasonableness of the rate, it was said:

"So that we are relieved from a consideration of the difficulties discussed in some of the cases in ascertaining the fact, and therefore now have squarely before us the questions whether in a State court a shipper in cases of interstate carriage can, by the principles of the common law, be accorded relief from unjust and unreasonable freight rates exacted from him, or shall relief in such cases be denied merely because such unreasonable rate has been filed and promulgated by the carrier under the interstate commerce act?"

Proceeding in an elaborate opinion to dispose of the question thus stated to be the only one for consideration, the conclusion was reached that jurisdiction to grant relief existed, and that to do so was not repugnant to the act to regulate commerce. Applying these conclusions to the findings of fact, the relief prayed was allowed. The court said:

"We therefore adopt the trial court's findings of fact, and, applying thereto the principles of law we have deduced, reverse the judgment, and here render judgment in appellant's favor for the said sum of $1,951.83, excessive freights charged, with interest. . . ."

The assigned errors are addressed exclusively to the operation of the act to regulate commerce upon the jurisdiction of the court below to entertain the controversy, and its power in any event to afford relief to the oil company, based upon the alleged unreasonableness of the rate under the circumstances disclosed. Before we take up the consideration of that subject, however, two questions must be disposed of: First, it is insisted that this court is without jurisdiction, because no Federal question is presented. We think it suffices to say that it obviously results from the statements previously made that a question of that character was presented by the pleadings, was passed upon by the trial court, was expressly and necessarily decided by the court below and is also essentially involved in the cause as it is before us. Second, it is urged that the effect of the act to regulate commerce upon the right of the oil company to recover need not be passed upon, since, even if error on that subject was committed below, a review of the decision in that regard is unnecessary, because if the correct legal inference be drawn from the facts found by the trial court, which were adopted by the appellate court, it will result that the railway company had not established a legal schedule of rates in compliance with the act to regulate commerce, and therefore the jurisdiction of the court and its right to afford relief was not at all affected by the provisions of the act. We do not presently stop to consider whether the consequences as to jurisdiction and right to recover which are asserted would result

if the premise was well founded, because we think the premise is either shown by the findings to be unfounded or it is not open for contention on the record. The premise rests upon two propositions of fact: *a.* That the findings of the trial court show that the rate sheet filed was joint and therefore did not necessarily relate to a shipment entirely over the road of the railway company. This contention, we think, is shown by the findings to be without merit, since those findings clearly point out that the rate sheet was filed by an agent of the defendant railroad, was by it adopted, and constituted the only rate sheet embracing the traffic in question. *b.* Although it is conceded that the evidence showed that the schedule of rates was established and filed with the Interstate Commerce Commission and was kept at the stations of the railway company for public inspection, and that the oil company had knowledge of the fact, it is insisted that the facts found do not justify the conclusion that there was a compliance with the requirements of the act to regulate commerce as to the posting of the established schedule. We think this contention is not open on this record. As we have seen, the trial court expressly concluded that the railway company had complied with the act to regulate commerce in the matter of filing, etc., its schedule of rates, and the appellate court opened its opinion by the statement that the course of the trial and the briefs of counsel confined the issue for determination to the question of the effect of the act to regulate commerce upon the rights of the parties, manifestly upon the assumption that the correctness of the conclusion of the trial court as to compliance with the act was conceded by both parties. In other words, as the court below in deciding the case expressly declared that the course of the argument and briefs of counsel before it had confined the case to the issue of whether there was a right to recover upon the hypothesis that a schedule of rates had been filed and published, we do not think that it is now open to contend that that which the court below in effect declared was conceded in the briefs of counsel to be a lawful schedule of rates was not such. *Non constat*, that if the Court of Civil Appeals, having the evidence before it, had not treated the case as presented, it might not have considered the facts in relation to the publication of the schedule and affirmatively found facts inevitably compelling the conclusion that the act to regulate commerce had been fully complied with, even if such inference was not sufficiently sustained by the findings of the trial court which the appellate court adopted. Because we thus find the question not open for consideration we must not be considered as conceding the correctness of the conclusion attempted to be drawn from the supposed failure to post.

We are thus brought to the underlying proposition in the case, viz., the effect of the act to regulate commerce upon the claim asserted by the oil

company. As presented below and pressed at bar, the question takes a seemingly two-fold aspect, the jurisdiction of the court below as affected by the act to regulate commerce and the right to the relief sought consistently with that act, even if jurisdiction existed. We say that these questions are only seemingly different, because they present but different phases of the fundamental question, which is the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers. We come, therefore, first, to the consideration of that subject.

Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge. (2 Kent Comm. 599, and note *a;* 2 Smith Lead. Cas. pt. 1, 8th ed., Hare & Wallace notes, p. 457.)

As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

Both parties concede that the question for decision has not been directly passed upon by this court, and that its determination is only persuasively influenced by adjudications of other courts. They both hence mainly rely upon the text of the act to regulate commerce as it existed at the time the shipments in question were made. The case, therefore, must rest upon an interpretation of the text of the act and is measurably one of first impression.

Let us, without going into detail, give an outline of the general scope of that act with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress and the remedies which the act established to accomplish the purposes which the lawmakers had in view.

The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any mechination or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made the duty of carriers subject to the act to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the act. To that end it was made the duty of the District Attorneys of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the Commission to enforce compliance with the act. The act specially provided that whenever any common carrier subject to its provisions "shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act. . . ." Power was conferred upon the Commission to hear complaints concern-

ing violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the Commission. By the ninth section of the act it was provided as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of precedure herein provided for he or they will adopt. . . ."

And by section 22, which we shall hereafter fully consider, existing appropriate common law and statutory remedies were saved.

When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. (*Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447, 455; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 145 U. S. 263, 275.) That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. (*Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 494.) And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. (*Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 Ib. 479.)

When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enact-

ment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently, with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an

order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

And the conclusion to which we are thus constrained by an original consideration of the text of the statute finds direct support, first, in adjudged cases in lower Federal courts and in the construction which the act has apparently received from the beginning in practical execution; and, second, is persuasively supported by decisions of this court, which, whilst not dealing directly with the question here presented, yet necessarily concern the same.

1. In *Swift* v. *Philadelphia etc. Ry. Co.*, (64 Fed. Rep. 59,) it was held that in an action at law to recover damages for the exaction of an alleged unreasonable freight charge, the rate established in conformity with the act to regulate commerce must be treated by the courts as binding upon the shipper, until regularly corrected in the mode provided by the statute. And in *Kinnavey* v. *Terminal R. R. Association*, (81 Fed. Rep. 302,) in an able opinion, the question was carefully considered and the same doctrine was announced and applied. When it is considered that the act to regulate commerce was enacted in 1887, and that neither the diligence of counsel nor our own researches have brought into view any case except the one now under consideration, holding that a court could, compatibly with the terms of that act, grant relief upon the basis that the established rate could be disregarded as unreasonable, it would seem to follow that the terms of the act had generally been treated in practical execution as incompatible with the existence of such power or right.

And this is greatly fortified when it is borne in mind that the reports of the decisions of the Interstate Commerce Commission show that many cases have been passed upon by that body concerning the unreasonableness of a rate fixed in an established schedule, which have resulted in awarding reparation to shippers and to the making of orders directing carriers to desist from future violation of the act; that is to say, in necessary legal effect correcting established schedules.

2. The cases of *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, (162 U. S. 184,) *Louisville & Nashville R. R. Co.* v. *Behlmer*, (175 Ib. 648,) and *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, (190 Ib. 275,) involved the enforcement against carriers of orders of the Commission. After deciding that the orders of the Commission were not entitled to be enforced, because of errors of law committed by that body, this court declined to consider the

question of the reasonablencss *per se* of the rates as an original question; in other words, the correction of the established schedule without previous consideration of the subject by the Commission. It was pointed out that by the effect of the act to regulate commerce it was peculiarly within the province of the Commission to primarily consider and pass upon a controversy concerning the unreasonableness *per se* of the rates fixed in an established schedule. It was, therefore, declared to be the duty of the courts, where the Commission had not considered such a disputed question, to remand the case to the Commission to enable it to perform that duty, a conclusion wholly incompatible with the conception that courts, in independent proceedings, were empowered by the act to regulate commerce, equally with the Commission, primarily to determine the reasonableness of rates in force through an established schedule.

In *Gulf, Colorado etc. Ry.* v. *Hefley*, (158 U. S. 98,) the facts were these: A rate had been fixed by a carrier in a bill of lading for an interstate shipment, which rate was less than that established under the provisions of the act to regulate commerce. On arrival of the goods at destination the carrier refused to deliver on tender of payment of the bill of lading rate, and demanded payment of and collected the higher established schedule rate. For so doing the carrier was proceeded against under a statute of the State of Texas, imposing a penalty upon a carrier for charging more than the rate fixed in a bill of lading. A judgment of the State court, enforcing the penalty, was reversed, upon the ground that the State statute, as applied, was repugnant to the act to regulate commerce, the court saying (p. 102):

"The carrier can not obey one statute without sometimes exposing itself to the penalties prescribed by the other. Take the case before us. If, in disregard of the joint tariff established by the defendant and the St. Louis and San Francisco Railway Company and filed with the Interstate Commerce Commission, the latter company, as a matter of favoritism, had issued this bill of lading at a rate less than the tariff rate, both the defendant company and its agent would, by delivering the goods upon the receipt of only such reduced rate, subject themselves to the penalties of the national law, while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the State act. In case of such a conflict the State law must yield.

In *Texas & Pacific Ry. Co.* v. *Mugg*, (202 U. S. 242,) the facts were as follows: On an interstate shipment a given rate, less than the lawful schedule rate, was quoted to the shipper by the agent of the railroad at the point of shipment. On the arrival of the goods at their destination the road exacted the schedule rate, whilst the shipper insisted he was entitled to the lower and quoted rate. And a recovery of the excess collected over the quoted rate was allowed by a court of the State of Texas. Reversing

the judgment, it was here held that the rate fixed in the schedule filed pursuant to the act to regulate commerce was controlling, that it was beyond the power of the carrier to depart from such rates in favor of any shipper, and that the erroneous quotation of rates made by the agent of the railroad did not justify recovery, since to do so would be in effect enabling the shipper, whose duty it was to ascertain the published rate, to secure a preference over other shippers, contrary to the act to regulate commerce.

In view of the binding effect of the established rates upon both the carrier and the shipper, as expounded in the two decisions of this court just referred to, the contention now made if adopted would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing of that equality which the statute commands.

But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the act to regulate commerce, viz: " . . . Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act can not be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by

the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

The proposition that if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without previous action by the commission great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency and affords no justification for so interpreting the statute as to destroy it. Even, however, if in any case we were at liberty to depart from the obvious and necessary intent of a statute upon considerations of expediency, we are admonished that the suggestions of expediency here advanced are not shown on this record to be justified. As we have seen, although the act to regulate commerce has been in force for many years, it appears that by judicial exposition and in practical execution it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the act. Thus, by section 1 of the act approved February 19, 1903, commonly known as the Elkins act, which, although enacted since the shipments in question, is yet illustrative, the willful failure upon the part of any carrier to file and publish "the tariffs or rates and charges," as required by the act to regulate commerce and the acts amendatory thereof, "or strictly to observe such tariffs until changed according to law," was made a misdemeanor, and it was also made a misdemeanor to offer, grant, give, solicit, accept or receive any rebate from published rates or other concession or discrimination. And in the closing sentence of section 1 it was provided as follows:

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of this act."

And, by section 3, power was conferred upon the Interstate Commerce Commission to invoke the equitable powers of a Circuit Court of the United States to enforce an observance of the published tariffs.

Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce.

The judgment below is, therefore, reversed, and the case remanded for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.